Supreme Court, U.S.
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In The

Supreme Court of the United States

ALYSON J. KIRLEIS,

Petitioner,

v.

DICKIE, McCAMEY & CHILCOTE, P.C.,
a Pennsylvania Professional Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit erred in holding that the protection against discrimination in employment afforded by antidiscrimination laws does not extend to individuals who have been nominally designated as shareholders by the entity which employs them.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner

Alyson J. Kirleis

Respondent

Dickie, McCamey & Chilcote, P.C.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alyson J. Kirleis respectfully seeks a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Third Circuit dated July 15, 2010, is reported at 2010 U.S. App. LEXIS 14530 and is reproduced in the Appendix ("*App.*") hereto at *App. 1-7.* The Third Circuit's decision denying the petition for rehearing en banc or, alternatively, for panel rehearing is unreported and is reproduced in the Appendix at *App. 79-80.* The decision of the United States District Court for the Western District of Pennsylvania dated October 28, 2009, is reported at 2009 U.S. Dist. LEXIS 100326 and is reproduced in the Appendix at *App. 8-78.*

STATEMENT OF JURISDICTION

The court of appeals issued its judgment and opinion on July 15, 2010. *App. 1-7.* A timely petition for rehearing en banc or, alternatively, for panel rehearing was denied on August 10, 2010. *App. 79-80.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

The district court had jurisdiction to hear Petitioner Alyson J. Kirleis' claim for alleged wage discrimination under 28 U.S.C. §§1331, 1343 and 1367. The Third Circuit had jurisdiction to hear Petitioner's appeal under 28 U.S.C. §1291.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. §203(d) and (e)(1), which provide:

> Definitions
>
> As used in this Act –
>
> * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

29 U.S.C. §206(d)(1), which provides:

> (d) Prohibition of sex discrimination.
>
> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which

such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

42 U.S.C. §2000e(b) and (f), which provide:

Definitions

For the purposes of this title –

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute

to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. §2000e-2(a)(1), which provides:

> Unlawful employment practices
>
> (a) Employer practices. It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> * * *

STATEMENT OF THE CASE

A. Factual Background.

Petitioner has been employed as an attorney by Respondent since 1988. In 2001, Petitioner was given the nominal titles of Class A shareholder and director by Respondent. Notwithstanding her titles as a Class A shareholder and director of Respondent, by all other factors that this Court has held to be relevant, Petitioner is an employee of Respondent. Petitioner does not act independently but rather is subject to the control of Respondent's Executive Committee, which is a small group of 13-15 attorneys who unilaterally make decisions for Respondent, including determination of annual compensation for all attorneys and support staff, distribution of work assignments, and hiring and firing of attorneys.

Petitioner's membership on Respondent's Board of Directors, which is comprised of all Class A shareholders, does not afford her the ability or opportunity to offer meaningful input into or influence over decisions made regarding the business, management and operation of the firm. Rather, the Board of Directors' participation in these decisions is nothing more than a *pro forma,* after-the-fact ratification or rubber stamp of decisions already made and actions already taken by the Executive Committee prior to any given monthly Board meeting. The Board of Directors has no input in determining annual compensation which is done in secret by the Executive Committee.

Respondent's Executive Committee can fire attorneys by reducing their compensation to such low levels that they are compelled to leave the firm. The Executive Committee also controls the rules and regulations of Petitioner's work through such actions as establishing a minimum/maximum billable hours policy and setting or approving hourly rates charged to clients.

Petitioner does not act independently but rather is supervised in her work by members of the Executive Committee. For example, Petitioner must comply with very specific rules and procedures created and implemented by members of the Executive Committee in connection with her work on cases for Respondent's largest client, which constitute the vast majority of Petitioner's caseload. Petitioner's continued assignment to handle cases for the firm's largest client is subject to the review of several members of

the Executive Committee who will take cases away from Petitioner if they determine that she is not handling the case appropriately.

Petitioner must get approval from members of the Executive Committee when she wants to spend the firm's money for client entertainment or to attend a continuing legal education seminar. Objective documentary evidence demonstrates that Respondent considered Petitioner and other shareholders to be employees. Petitioner does not share in the profits of Respondent in a meaningful way but rather is paid a salary which is established by the Executive Committee.

B. Proceedings Below.

On November 9, 2006, Petitioner sued Respondent, asserting claims of wage discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, as amended, the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201, *et seq.*, and the Pennsylvania Human Relations Act, 43 P.S. §951, *et seq.* Petitioner also asserted a claim of retaliation under Title VII.

Respondent moved for summary judgment on the issue of Petitioner's employment status. Petitioner opposed Respondent's motion for summary judgment by filing a response, brief in opposition to the motion and a counterstatement of Respondent's 194 material facts together with 726 additional material facts of her own. Petitioner's evidence in opposition to

Respondent's motion for summary judgment included her own sworn affidavit, excerpts and exhibits from her own deposition testimony, sworn affidavits from two former shareholder-directors of Respondent, documents produced by Respondent in discovery and excerpts and exhibits from the depositions of Respondent's designated witnesses. In all, Petitioner's evidence encompassed 1468 pages of materials.

On October 28, 2009, the district court granted Respondent's motion for summary judgment. The district court concluded that the relationship between Respondent and its shareholders is defined by Respondent's by-laws and held as a matter of law that Petitioner is an employer and cannot invoke the protection afforded by antidiscrimination laws. *App. 8-9.* In making its decision, the district court placed complete reliance on Respondent's by-laws and ignored this Court's decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), where this Court stated that the answer to whether a shareholder in a professional corporation is an employee depends on all the incidents of the relationship with no one factor being decisive. The district court improperly disregarded the substantial evidence proffered by Petitioner of all the incidents of her relationship with Respondent as an employee in violation of the *Clackamas* decision. Petitioner timely appealed from that ruling to the Third Circuit.

On July 15, 2010, the Third Circuit affirmed the district court's grant of summary judgment in favor of Respondent without oral argument, holding in a

3½ page opinion that " . . . [Petitioner] is an employer at [Respondent] as a matter of law." *App. 4.* The Third Circuit explicitly adopted the district court's opinion and reasoning therein as its own. *Id.* The Third Circuit denied rehearing en banc and panel rehearing. *App. 79-80.*

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C. v. WELLS.*

The Court should grant the petition because the decision below conflicts with this Court's decision in *Clackamas.* The Third Circuit's decision reflects either a fundamental misunderstanding of the required analysis in which it was to engage as directed by the Court in *Clackamas* or a flagrant disregard of the Court's holding in that case.

In *Clackamas*, the Court held that a person's particular title should not be used to determine whether or not he or she is an employee or an employer for purposes of applying antidiscrimination laws. 538 U.S. at 450. The Court stated that the common law element of control is the principal guidepost which should be followed in considering this issue. *Id.* at 448.

Looking to the EEOC Compliance Manual for guidance in answering the specific inquiry of whether

a shareholder/director in a professional corporation is an employee, the Court stated in *Clackamas* that it was persuaded by "the EEOC's focus on the common-law touchstone of control" and its submission that each of six enumerated factors was relevant to the inquiry of whether a shareholder/director in a professional corporation is an employee. *Id.* at 449. The Court also noted and agreed with the EEOC's caveat that the six factors identified in the Compliance Manual were not an exhaustive list and that "the answer to whether a shareholder-director is an employee or an employer cannot be decided in every case by a 'shorthand formula or magic phrase.'" *Id.*, fn. 10.

The Court concluded that the question of whether or not a person is an employee for purposes of being able to invoke the protections afforded by anti-discrimination laws can be answered only by examining all of the facts and circumstances pertaining to the parties' relationship in each case with no one factor being entitled to more weight than the others. In this regard, the Court in *Clackamas* stated, as follows:

> " . . . , ***the answer to whether a shareholder-director is an employee depends on 'all the incidents of the relationship . . . with no one factor being decisive.'*** [citation omitted]" [Emphasis added; *Id.* 450-451]

The Court's endorsement of the EEOC standard and its conclusion that the employment status of a shareholder-director in a professional corporation for

purposes of antidiscrimination laws must be determined by considering and analyzing all the facts and circumstances which demonstrate the true nature of the relationship between the claimant and the entity which employs him against each of the six enumerated factors clearly controls in this case.

The Third Circuit failed to comply with the Court's directive in *Clackamas* to consider all the incidents of the relationship between Petitioner and Respondent. Instead, although it paid lip service to this Court's decision in *Clackamas*, the Third Circuit erroneously placed complete reliance on the language of Respondent's corporate by-laws and used the contents of that document to justify its rejection of Petitioner's overwhelming evidence of material facts which demonstrate the true nature of her relationship with Respondent, one of an employee, and from which a reasonable jury could conclude that control over the operation and management of Respondent lies in the hands of the Executive Committee and not the Petitioner and the other shareholders of the firm. Specifically, the Third Circuit concluded that Petitioner is an employer and not an employee for purposes of invoking the protection of antidiscrimination laws because Petitioner's status as a shareholder of Respondent enables her to participate in Respondent's governance, provides her with a right not to be terminated without a ¾ vote of the Respondent's Board of Directors for cause and entitles her to share in the profits, losses and liabilities of the firm. *App. 4.* These reasons on which the Third Circuit's decision is

based come from Respondent's by-laws and demonstrate that instead of looking at all of the incidents of the relationship between Petitioner and Respondent, the Third Circuit relied completely on the content of Respondent's by-laws and ignored Petitioner's substantial evidence of all the facts and circumstances of her relationship with Respondent, including evidence of how Respondent's by-laws are not followed by Respondent, which show that Petitioner is an employee.

The Third Circuit's complete reliance on the content of Respondent's by-laws and rejection of Petitioner's substantial evidence of the actual incidents of her relationship with Respondent also reflects the fact that the Third Circuit failed to apply the correct standard of review in direct conflict with the Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, the Court held that when considering a motion for summary judgment, a court is not to make credibility determinations or weigh the evidence. In this regard, the Court stated in *Anderson*, as follows:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." [477 U.S. at 255]

Since Petitioner was the nonmoving party, the Third Circuit was required to believe her evidence and draw all justifiable inferences from the evidence of record in her favor in determining whether there are genuine issues of material fact present which require the issue of Petitioner's employment status to be decided by a jury.

The Third Circuit's review of the record as evidenced by its 3½ page opinion failed to meet the well-established standard stated by the Court in *Anderson*. Instead of believing Petitioner's evidence and drawing all justifiable inferences from the evidence in her favor as required by *Anderson*, the Third Circuit actually weighed and rejected Petitioner's evidence, just as the district court had done, in direct contravention of the standard articulated by the Court in *Anderson*. This fact is demonstrated by the Third Circuit's characterization of Petitioner's position that she is an employee of Respondent as lacking proof. In this regard, the Third Circuit stated:

> " . . . [Petitioner] urges us to recognize her ***supposed*** employee status by ***alleging*** that her position as a Class A shareholder on the Board of Directors is a mere 'rubber stamp' function. She also ***claims*** that the Executive Committee – not the Board of Directors – sets hourly rates, makes compensation decisions, and sometimes forces shareholders to resign. Furthermore, [Petitioner] ***asserts*** that her work for . . . , [Respondent's] largest client, is dictated by particular guidelines and is closely supervised, a fact she believes

demonstrates her status as an employee." [emphasis added; *App. 3-4.*]

"Supposed," "allege," "claims" and "asserts" are all words which mean that the subject of the sentence is without proof. The Third Circuit's use of these words reflects the fact that in its view, there was no evidence of record to support these facts. Contrary to the Third Circuit's determination, however, Petitioner presented overwhelming evidence on each of the factual issues that the Third Circuit specified in its opinion as lacking proof. It is clear from the Third Circuit's characterization of Petitioner's employment status as "supposed" and its description of her evidence as allegations, claims and assertions that instead of believing Petitioner's evidence and drawing all reasonable inferences in her favor in determining whether there are genuine disputed issues of material facts, the Third Circuit either ignored Petitioner's evidence or weighed her evidence against Respondent's by-laws and rejected it. The Third Circuit's conduct in this regard clearly contravenes the standard of review that it was required to apply.

The Third Circuit erroneously asserted that Petitioner urged the court to recognize that she is an employee of Respondent. *App. 3.* To the contrary, Petitioner sought only a determination by the Third Circuit that she had the right to submit the question of her employment status to a jury for resolution after presentation by the parties of their competing evidence on the issue. Petitioner demonstrated to the Third Circuit with thorough and complete citation to

the record that she had submitted substantial overwhelming evidence of all the incidents of her relationship with Respondent from which a reasonable fact finder could conclude that Petitioner is an employee of Respondent. Petitioner was the nonmoving party and as such was required to oppose Respondent's motion for summary judgment by coming forward with sufficient evidence of record to demonstrate genuine issues of material fact which must be determined by a jury. Petitioner met her obligation having supplied the district court and the Third Circuit with 1468 pages of evidentiary materials. It was the Third Circuit's obligation to review the record to determine whether or not Petitioner met her burden of demonstrating the presence of genuine issues of material fact in connection with the issue of her employment status. The Third Circuit was required to believe Petitioner's evidence and draw all reasonable inferences in her favor. The Third Circuit failed to do this and instead substituted itself for the jury, weighed and rejected Petitioner's evidence and decided the factual issues which was directly contrary to the standard of review as clearly stated by Court in *Anderson*.

The Third Circuit's failure to comply with *Clackamas* is compounded by its adoption of the district court's improper use of the economic realities test which was articulated by the U.S. Court of Appeals for the Seventh Circuit in *EEOC v. Dowd & Dowd, Ltd.*, 736 F.3d 1177 (7th Cir. 1984). In *Dowd*, the Seventh Circuit held that shareholders in a professional corporation, like partners in a partnership, are

not employees under Title VII because the economic reality of a professional corporation is that the management, control and ownership of the corporation is much like the management, control and ownership of a partnership. *Id.* at 1178. Finding that shareholders in professional corporations are more analogous to partners in a partnership than to shareholders in a general corporation, the Seventh Circuit in *Dowd* held that shareholders in professional corporations are not employees under Title VII.

In *Clackamas*, the economic realities test articulated by the Seventh Circuit in *Dowd* was specifically considered and rejected by the Court in favor of the EEOC standard which is based on the common law element of control. The Court in *Clackamas* rejected the argument that a shareholder-director's employment status should be determined by considering whether the shareholder-director appears to be more like a partner in a partnership, noting that in today's modern business world, there are members of partnerships who may qualify as employees because control over the management and operation of the partnership lies in the hands of a smaller group of managing partners. In this regard, the Court stated in *Clackamas* as follows:

> Rather than looking to the common law, petitioner argues that courts should determine whether a shareholder-director of a professional corporation is an "employee" by asking whether the shareholder-director is, in reality, a "partner." Brief for Petitioner 9, 15-16,

> 21 (arguing that the four shareholders in the clinic are more analogous to partners in a partnership than shareholders in a corporation and that "those who are properly classified as partners are not 'employees' for purposes of the anti-discrimination statutes"). ***The question whether a shareholder-director is an employee, however, cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner. Today there are partnerships that include hundreds of members, some of whom may well qualify as "employees" because control is concentrated in a small number of managing partners***. Cf. *Hishon v. King & Spalding*, 467 U.S. 69, 80, n. 2, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984) (Powell, J., concurring) ("An employer may not evade the strictures of Title VII simply by labeling its employees as 'partners'); *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 709 (CA7 2002) (Easterbrook, J., concurring in part and concurring in judgment); *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (CA9 1996). Thus, asking whether shareholder-directors are partners -- rather than asking whether they are employees – simply begs the question." [Emphasis added; 538 U.S. at 445-446.]

Notwithstanding the Court's clear and unequivocal rejection of the economic realities test in *Clackamas*, the district court nevertheless applied that test to conclude that "[Petitioner's] position as a Class A

shareholder/director is quite similar to that of equity partners of partnership law firms who are generally found to be employers." *App. 66.* In reaching this conclusion, the district court improperly relied on decisions rendered by courts in partnership cases decided prior to *Clackamas*, including the *Dowd* case, in which the economic realities test was utilized, finding such cases "to be most helpful, as the economic realities test takes into account myriad facts and circumstances similar to those considered under *Clackamas*." *App. 64.* The district court was fully aware of the impropriety of its application of the economic realities test, having specifically noted in its opinion that the Court " . . . ***declined to follow the economic realities test . . .*** " **and** " . . . ***rejected . . . [this] categorical [approach], and adopted the functional test developed by the EEOC . . . to resolve the question of who qualifies as an employee.***" (Emphasis added) *App. 23-24.* However, notwithstanding the Court's express direction to the contrary, the district court proceeded to apply the economic realities test to erroneously conclude that Petitioner "shares many of the attributes of traditional equity partners in a large law firm." *See App. 63-67, 74-75.*

The district court's improper application of the rejected economic realities test was sanctioned by the Third Circuit when it adopted the district court's opinion. *App. 4-5.* In so doing, the Third Circuit made the district court's failure to adhere to the requirements imposed by the Court in *Clackamas* its own.

The Court's decision in *Clackamas* does not give courts the option to choose the test which is to be applied in determining whether a shareholder/director in a professional corporation is an employee for purposes of invoking the protections against discrimination in employment provided by Title VII and other antidiscrimination laws. Rather, *Clackamas* is a directive which mandates that all facts and circumstances pertaining to the true relationship between the parties must be analyzed against each of the six factors enumerated in that decision and not just one or two. The Third Circuit plainly ignored this holding. This Court should grant the petition in order to compel compliance with *Clackamas* and to ensure that Petitioner and other qualified members of protected classes who are shareholders in professional corporations are afforded the full measure of protection from discrimination that Congress intended and provided for in Title VII and the Fair Labor Standards Act.

II. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL LAW.

The question presented in this case involves an important issue of federal law. The Third Circuit's decision permits professional women who are nominally shareholders in their firms but who in reality do not possess the rights and authority associated with ownership to be deprived of the benefits of protection against discrimination available under the antidiscrimination laws. The Third Circuit's decision in

this case illustrates the harm that is inflicted when a court relies on an individual's nominal title as a shareholder to determine his or her employment status for purposes of applying antidiscrimination laws. The Third Circuit's faulty approach was recognized by the Court in *Clackamas* as antithetical to the broad application of Title VII's remedial powers intended by Congress. The Court's decision in *Clackamas* mandates that courts look beyond the title to consider all of the facts and circumstances of the relationship between the parties to determine whether or not the plaintiff in a discrimination action is, in fact, an employee entitled to the protection afforded by Title VII and other similar federal and state laws. The Third Circuit's decision involves an exceptionally important issue as it not only affects professional women but also other professionals who come within the various classes of individuals protected by antidiscrimination laws by virtue of, *inter alia*, their age, ethnicity, national origin or a disability. They too could be precluded from pursuing a discrimination claim by the mere formality of being made a shareholder by the entity which employs them.

The Third Circuit's decision is based on a belief that law firms today operate in the same manner as they did in 1984 when Justice Powell wrote his concurring opinion in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), where he stated his belief that the relationship among law partners is different from the relationship between an employer and its employee. *Id.* at 79-80. The Third Circuit adopted as its own the

district court's reliance on that statement from Justice Powell's opinion in *Hishon* as support for its conclusion that equity partners in today's law firms are employers.

However, Justice Powell's comment in *Hishon* on which the Third Circuit relies was written in 1984, more than 25 years ago. The practice and business of law have changed since 1984. The Court in *Clackamas* recognized this fact, stating that "[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." 538 U.S. at 446. The Third Circuit's decision in effect creates a separate status for law firms and other professional corporations by exempting them from liability for discrimination by a small number of managing shareholders against female and minority shareholders whose title, as here, is merely nominal.

Unlike the Court in *Clackamas*, the Third Circuit does not appear to recognize that today all shareholders in law firms are not equal simply because they have the nominal title of shareholder. In subscribing to the notion that all shareholders are equal, the Third Circuit ignored the evidence presented by Petitioner which demonstrates that in many law firms today, including Respondent, many law firm shareholders work under the direction and control of a few controlling members of the firm, without receiving a real share of the profits of the corporation and without having the authority or control over the

management and operation of the corporation normally attributed to owners. Petitioner's evidence demonstrated, *inter alia,* that her compensation was determined solely and exclusively by Respondent's Executive Committee, the votes that she cast at meetings of the Board of Directors were mostly ratification of decisions already made and implemented by Respondent's Executive Committee, and her capital contribution to Respondent was an insignificant amount.

As a result of the Third Circuit's decision, female and other minority professionals are severely restricted in their ability to grow and advance in their chosen field of work. Under the Third Circuit's decision, once the female or minority professional is made a nominal shareholder by the employer, she loses the protection against discrimination in employment afforded by Title VII and similar statutes. Law firms such as Respondent as well as other professional corporations which create a sham arrangement of ownership and bestow the title of shareholder or partner are able to freely discriminate against their female and minority professionals without fear of liability under applicable antidiscrimination laws. The firm can pay the nominal shareholder less than male shareholders doing similar work or even subject the nominal shareholder to a discriminatorily hostile work environment. Being left without recourse to a viable legal remedy, the shareholder is then faced with the dilemma of either enduring the humiliation and indignity of the discriminatory conduct by the

employer or leaving the employer to work elsewhere. The problem with staying and enduring the discrimination is obvious. Seeking another job with a different employer is problematic because it results in loss of income and job responsibilities since the individual must start over to build her reputation with and earn the trust of a new employer to demonstrate that she is a high performer who is deserving of increased compensation and responsibilities.

The importance of the Third Circuit's decision to female and minority shareholders in professional corporations and the potential for the abuses described above is demonstrated by the attention which this case has received in news media and on Internet employment law blogs. Articles about the district court's decision in late October of 2009 granting the Respondent's summary judgment motion, were published on the Internet in early November of 2009 by the Pittsburgh Tribune-Review, the Associated Press, the ABA Journal and Law360.com. *App. 81-89.* Each of those articles specifically noted that Petitioner intended to file an appeal from the district court's ruling with the Third Circuit.

The progress of the case before the Third Circuit was being monitored by the media and the legal community at large because when briefing by the parties before the Third Circuit was completed in late April of 2010, additional articles commenting on the case and the issue that was presented to the Third Circuit by the Petitioner were published by the ABA Journal, The Am Law Daily, The Legal Intelligencer and the

Texas Employment Law Blog. *App. 90-103.* The case was characterized as "a potentially groundbreaking discrimination suit." *App. 94.* It was further noted that law firms would probably be closely watching the outcome of the appeal. *App. 93.*

Almost immediately after the Third Circuit's decision was entered, articles about the decision were published by Law360.com, the Legal Intelligencer, the Am Law Daily, the ABA Journal, The Careerist blog, PlanSponsor.com, New Jersey Employment Law Blog, Above the Law blog, the New York Employment Lawyer blog, the Conglomerate blog and Hunton Employment & Labor Law blog. *App. 104-146.* These articles are significant because they demonstrate the widespread interest in the Third Circuit's decision and the fact that the question of whether a shareholder in a law firm is an employer or employee is presently a hotly contested issue. As noted in the Law360.com article dated July 15, 2010, the outcome of the U.S. Equal Employment Opportunity Commission's age discrimination suit against the law firm of Kelley, Drye & Warren, which is presently pending in the U.S. District Court for the Southern District of New York, on the claim that the firm's mandatory retirement policy discriminated against older partners will depend on how the Court's decision in *Clackamas* is applied. *App. 106.* The articles are also significant because they point out the potential for increased discrimination against female and minority shareholders by professional firms and the fact that female and minority shareholders who have no legal

recourse to address the discriminatory conduct will have no choice but to endure the discrimination or leave the firm for employment elsewhere.

The Third Circuit's decision is completely contrary to both the Court's holding in *Clackamas* and Congress' intent in enacting Title VII and cannot in justice be permitted to stand. Accordingly, the Third Circuit's decision poses a question of fundamental importance which warrants this Court's review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant her petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4498

ALYSON J. KIRLEIS,

Appellant.

v.

DICKIE, McCAMEY & CHILCOTE, P.C.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:06-cv-01495)
District Judge: Hon. Arthur J. Schwab

Submitted under Third Circuit LAR 34.1(a)
on July 13, 2010.

Before: FUENTES, ALDISERT, and ROTH,
Circuit Judges.

(Opinion Filed: July 15, 2010)

OPINION

ROTH, *Circuit Judge*:

Alyson J. Kirleis appeals from the District Court's order granting summary judgment to Dickie, McCamey & Chilcote, P.C. (DMC) on the issue of whether Kirleis is an employer or employee of DMC. We exercise plenary review over a district court's decision to grant summary judgment. *Dique v. N.J. State Police*, 603 F.3d 181, 185 (3d Cir. 2010).[1] We will affirm the District Court's order.

We assume the parties' familiarity with the factual and procedural history, which we describe only as necessary to explain our decision. Kirleis has worked as an attorney at DMC, a Pittsburgh-based law firm, for over twenty years and has been a Class A Shareholder-Director for the last eight years. In November 2006, Kirleis filed a complaint against DMC alleging that she was paid less than her male counterparts, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the Equal Pay Act, 29 U.S.C. § 201, *et seq.*, and the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. § 951, *et seq.* DMC moved to dismiss Kirleis's complaint on the basis that she was not an employee of DMC, but, rather, an employer and as such was outside the protection of the employment discrimination laws. The United States District Court for the

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[1] The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1367, and we have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Western District of Pennsylvania denied DMC's motion. After discovery, DMC moved for summary judgment on the same grounds, and the District Court granted the motion.

To determine whether a shareholder-director of a professional corporation is an employer or an employee entitled to invoke the anti-discrimination laws, we examine six factors: "(1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; [and] (6) whether the individual shares in the profits, losses, and liabilities of the organization." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449-50 (2003) (citation omitted). The touchstone of the inquiry is control, and the answer "depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 449, 451 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992)).

On appeal, Kirleis submits that the District Court erred on every point of its *Clackamas* analysis. Kirleis urges us to recognize her supposed employee status by alleging that her position as a Class A Shareholder on the Board of Directors is a mere

"rubber-stamp" function. She also claims that the Executive Committee – not the Board of Directors – sets hourly billable rates, makes compensation decisions, and sometimes forces shareholders to resign. Furthermore, Kirleis asserts that her work for the University of Pittsburgh Medical Center, DMC's largest client, is dictated by particular guidelines and closely supervised, a fact she believes demonstrates her status as an employee.

We cannot agree that Kirleis is a mere employee of DMC, and our review of the record supports the District Court's conclusion in this regard. As a Class A Shareholder-Director of DMC, Kirleis has the ability to participate in DMC's governance, the right not to be terminated without a ¾ vote of the Board of Directors for cause, and the entitlement to a percentage of DMC's profits, losses, and liabilities. *See Solon v. Kaplan*, 398 F.3d 629, 633 (7th Cir. 2005) (termination only by ⅔ vote of general partners, access to financial information, participation in firm governance, and a share in profits and losses distinguished a partner from associates and rendered him an employer); *Schmidt v. Ottawa Med. Ctr., P.C.*, 322 F.3d 461, 467-68 (7th Cir. 2003) (a shareholder in a professional corporation who possesses the right to vote on matters put before the board and the opportunity to share in profits is an employer for the purposes of the anti-discrimination laws). For these and all of the other reasons set forth in the District Court's thorough opinion, we find that Kirleis is an employer at DMC as a matter of law. As an employer, Kirleis is

precluded from bringing claims under the employment anti-discrimination laws. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 54 (1974). Accordingly, the District Court properly awarded summary judgment to DMC.

For the foregoing reasons, we will affirm the District Court's order granting summary judgment to DMC.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4498

ALYSON J. KIRLEIS,

Appellant.

v.

DICKIE, McCAMEY & CHILCOTE, P.C.

On Appeal from the United States District Court
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District Judge: Hon. Arthur J. Schwab

Submitted under Third Circuit LAR 34.1(a)
on July 13, 2010.

Before: FUENTES, ALDISERT, and ROTH,
Circuit Judges.

JUDGMENT

(Filed Jul. 15, 2010)

This case came on to be heard on the record from the United State District Court for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on July 13, 2010.

Upon consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the Order of the District Court entered October 28, 2009, be and the same are hereby affirmed. Costs taxed against appellant.

All of the above in accordance with the Opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: July 15, 2010

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

ALYSON J. KIRLEIS,

Plaintiff,

v.

DICKIE, McCAMEY & CHILCOTE, P.C.,

Defendant.

06cv1495
Electronically Filed

MEMORANDUM OPINION RE: DEFENDANT'S PHASE ONE MOTION FOR SUMMARY JUDGMENT ON THRESHOLD EMPLOYMENT STATUS ISSUE (DOC. NO. 130)

(Filed Oct. 28, 2009)

I. INTRODUCTION AND BACK GROUND [sic]

A. Introduction

Plaintiff Alyson J. Kirleis is an equity Class A Shareholder/Director at defendant law firm, Dickie, McCamey & Chilcote, PC ("DMC" or "the Firm"), a Pennsylvania professional corporation. The relationship between Shareholders of DMC and the corporation are defined by its By-Laws, pursuant to which plaintiff receives annual compensation and a comprehensive package of benefits.

Section 3.08(g) of the By-Laws provide Ms. Kirleis with, *inter alia*, a car allowance of $600 per month, a parking lease at DMC's PPG Place office complex, an annual trip to a legal seminar or convention with

airfare included plus a $2,000 spending allowance, reimbursement of 70% of her annual dues at St. Clair Country Club, and a life insurance policy with a death benefit of $800,000. Ms. Kirleis accepted these benefits, and in addition, she accepted: (1) annual compensation pursuant to Section 4.03(h) of the By-Laws; (2) a position on the Board of Directors pursuant to Section 2.02; and (3) a right to vote on all DMC matters reserved to the Board, pursuant to Section 1.03(b) of the By-Laws.[1] Plaintiff served as a member of various sub-committees of DMC, including as Chair or Co-Chair, and held various management positions, including: Chair of the Associate Review Committee, member of an ad hoc committee charged with administering an Executive Committee election, and member of the Shareholder Evaluation Committee.

After careful review of defendant's motion for summary judgment, the briefs in support and in opposition, the statements of 920 material facts and counter statements of 920 material facts, and the voluminous supporting materials, the Court finds, as a matter of law based upon undisputed material facts, that plaintiff is not an "employee" within the meaning of the anti-discrimination laws. Instead, the Court finds plaintiff to be a statutory "employer" who cannot claim the protection afforded by those laws.

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[1] Since 2001, plaintiff has attended 42 of the 96 Board of Directors meetings held through May 2009.

Because a reasonable jury could not find otherwise on the record before the Court,[2] the Court will grant summary judgment for defendant on the threshold issue presented in this case, for the reasons to follow.

B. The Complaints

Plaintiff has filed suit under federal and state anti-discrimination employment laws alleging that DMC, a Pennsylvania professional corporation engaged in the practice of law, discriminated and then retaliated against her because of her sex, and subjected her to a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951, et seq. Additionally, plaintiff claims that DMC paid her less than similarly situated male Class A Shareholder/Directors, in violation of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, et seq. Plaintiff seeks compensatory damages, punitive damages and injunctive relief.

At a prior stage of the proceedings, a colleague on this Court summarized plaintiff's claims as follows:

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[2] A contrary finding would, under plaintiff's theory, essentially mean that every Class A Shareholder/Director at DMC, other than perhaps the President and a few members of the Executive Committee, could be considered an "employee."

> Plaintiff filed charges of sex discrimination, hostile work environment and retaliation with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC") on October 19, 2006. Plaintiff then filed suit on December 18, 2006 alleging that the method of establishing her annual compensation was not applied to similarly situated male attorneys who were performing the same, or less work, than plaintiff. Plaintiff further alleges that defendant has a separate and lower employment track for female attorneys who have taken maternity leave and/or have children. Plaintiff also contends that defendant has a pattern and practice of discriminating against women because of their sex in the terms and conditions of their employment, including paying lower wages to women, assigning women to lower quality cases, and/or assigning women to roles secondary to male attorneys on cases. Plaintiff also alleges that defendant maintains a hostile work environment towards women.

Memorandum Order of July 24, 2007 (Doc. No. 54), *Kirleis v. Dickie, McCamey & Chilcote, PC*, 2007 WL 2142397 at *1 (W.D. Pa. 2007) (Lancaster, J.). In a separate complaint in a related (and now consolidated and closed action), plaintiff alleges that DMC

retaliated against her in various ways since filing her claims with the EEOC and the PHRC.[3]

C. The Threshold Issue

Before litigating these serious allegations, the Court must resolve the threshold issue of whether plaintiff is properly considered an "employee" of DMC for purposes of the employment anti-discrimination laws, Title VII, the PHRA and the FLSA,[4] or whether she must be deemed an "employer" who is not protected by those laws. Both parties agree that the threshold determination is controlled by the decision of the United States Supreme Court in *Clackamas Gastroenterology Assocs. v. Wells,* 538 U.S. 440 (2003).

The *Clackamas* Court agreed with the EEOC that the employer-employee determination should be made with reference to the common-law definition of the master-servant relationship, focusing on the element of control and six non-exhaustive factors bearing on that relationship. *Id.* at 442. Summarizing the EEOC approach adopted in *Clackamas,* the Court stated as follows:

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[3] The retaliation claim was filed at Civil Action No. 06-1666, which has been closed and consolidated with this action at Civil Action No. 06-1495.

[4] The parties agree that Title VII, the PHRA and the FLSA, all of which are designed to protect employees, should be similarly interpreted and applied, and that, if plaintiff is deemed to be an employer, she is not protected by any of these statutes.

> As the EEOC's standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. The mere fact that a person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor. See [EEOC Compliance Manual § 605:0009] ("An individual's title . . . does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee"). Nor should the mere existence of a document styled "employment agreement" lead inexorably to the conclusion that either party is an employee. See [[EEOC Compliance Manual § 605:0009] (looking to whether "the parties intended that the individual be an employee, as expressed in written agreements or contracts"). Rather, as was true in applying common-law rules to the independent-contractor – versus-employee issue . . . , the answer to whether a shareholder-director is an employee depends on "'all of the incidents of the relationship . . . with no one factor being decisive.'" [*Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 324 (1992)]. . . .

Id. at 450-51 (additional citation omitted).

The United States Court of Appeals for the Ninth Circuit found four physician-shareholders who owned the professional corporation and constituted its board of directors should be deemed to be employees, finding no reason to permit a professional corporation to reap the tax and civil liability advantages of its corporate status and then argue that it is like a partnership so as to avoid employment discrimination liability. Rejecting this categorical approach, which deemed *any* person working in or for a professional corporation to be an employee, the *Clackamas* case held that shareholder-directors of a professional corporation could, under appropriate circumstances, be counted as "employees" towards the fifteen-employee threshold for covered employers under the Americans with Disabilities Act of 1990 ("ADA"). *Id.*

Clackamas also noted that the "meaning of the term 'employee' comes into play when determining whether an individual is an 'employee' who may invoke" the protections of the ADA. *Id.* at 447 n.6. DMC argues that under *Clackamas,* Ms. Kirleis is not its "employee" but is, in fact, an "employer" in the professional corporation and that, therefore, she is not protected by the anti-discrimination laws. Plaintiff asserts, on the other hand, that the evidence of record, viewed as a whole, precludes summary judgment in favor of DMC on the issue of her employment status "because there are genuine issues of material fact with respect to each of the six *Clackamas* factors. The evidence submitted by Kirleis demonstrates that she does not act independently and is subject to the

supervision and control of DMC's Executive Committee, which is a small group of 13 to 15 attorneys who unilaterally make all management decisions for DMC, including determination of annual compensation for all attorneys and support staff, distribution of work assignments, and hiring and firing of attorneys." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 142) at 3.

D. Procedural Background

On July 24, 2007, another member of this Court[5] entered a Memorandum Order (Doc. No. 54) denying DMC's motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), on the ground that plaintiff is not an employee under the applicable statutes, without prejudice to DMC's ability to raise the employer-employee issue following discovery.[6] This Memorandum Order

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[5] On April 16, 2009, United States District Judge Gary L. Lancaster entered an Order recusing himself (Doc. No. 92), and the case was reassigned to this Judge the following day.

[6] The parties do not suggest that the denial of the motion to dismiss establishes the law of the case on the threshold issue of plaintiff's status as employer or employee. Indeed, in holding that plaintiff was "an employee covered by the applicable statutes" Judge Lancaster explicitly stated: "We note that although we have weighed the [limited] evidence presented [affidavits and documents], the standard of proof at this point is lower than the standard of proof required for summary judgment. Therefore, we deny defendant's motion to dismiss without prejudice to defendant's right to raise this issue after discovery, if appropriate." *Kirleis v. Dickie, McCamey & Chilcote, PC*, 2007

(Continued on following page)

also denied DMC's alternative motion to compel arbitration of the claims pursuant to the DMC By-Laws providing for such arbitration because, under Pennsylvania law, which the parties agreed controlled the issue, plaintiff had not expressly agreed to waive her legal claims to arbitration.

DMC filed a timely appeal of the Memorandum Order denying its motion to compel arbitration to the United States Court of Appeals for the Third Circuit, which on March 24, 2009, affirmed the District Court's denial of the motion to compel arbitration. *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156 (3d Cir. 2009).[7] The Court of Appeals for the Third Circuit affirmed the District Court's finding that Ms. Kirleis had not expressly agreed to arbitrate her claims because there was no evidence that she had actually received a copy of the DMC By-Laws, and she was unaware of the existence of the arbitration provision contained therein. Accordingly, because Pennsylvania law did not recognize an implicit

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WL 2142397 at *6. A motion for summary judgment, which is filed on the basis of a developed record, serves a different function than a motion to dismiss, which is filed before the commencement of discovery. *Behrens v. Pelletier*, 516 U.S. 299, 305-313 (1996). See also *Rouse v. II-VI Inc.*, 2008 WL 2914796 (W.D. Pa. 2008) (McVerry, J.) (collecting numerous cases recognizing that the law of the case doctrine does not preclude a grant of summary judgment in favor of a defendant whose motion to dismiss has previously been denied).

[7] DMC did not appeal the District Court's Order denying its motion to dismiss, which obviously was interlocutory.

agreement to arbitrate her claims, the arbitration provision of the By-Laws was unenforceable.

After the Court of Appeals entered its Mandate (Doc. No. 94) on May 11, 2009, this Court convened an initial case management conference. DMC filed a Motion for Bifurcation of Discovery and Dispositive Motion Proceedings, (Doc. No. 96), and plaintiff filed her response in opposition. After hearing argument on this motion at the case management conference, this Court entered an Order (Doc. No. 110) on June 11, 2009, granting the motion to bifurcate discovery,[8] and setting a schedule for Phase I discovery on the threshold issue of plaintiff's status as employer or employee.

Following extensive discovery, DMC filed its motion for summary judgment, concise statement of 194 material facts, and brief in support of summary judgment, Ms. Kirleis filed her response, counter-statement of 194 material facts with 726 additional facts and brief in opposition, and defendant filed a reply brief and counter statement to plaintiff's 726 additional facts. The threshold issue is now ripe for determination.

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[8] Bifurcation into threshold phase discovery and merits phase discovery is a common practice in employment discrimination cases. See, e.g., *Ziegler v. Anesthesia Assocs. Of Lancaster, Ltd.*, 74 Fed. Appx. 197, 198 (3d Cir. 2003).

II. Legal Principles

A. Summary Judgment Standards

Fed.R.Civ.P. 56(c) currently provides that on a motion for summary judgment, the "judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." "Rule 56 of the Federal Rules of Civil Procedure 'mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Marten v. Godwin,* 499 F.3d 290, 295 (3d Cir. 2007), citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). Summary judgment is appropriate "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Woodside v. Sch. Dist. of Philadelphia Bd. of Educ.,* 248 F.3d 129, 130 (3d Cir. 2001), quoting *Foehl v. United States,* 238 F.3d 474, 477 (3d Cir. 2001) (citations omitted).

An issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); see also *Doe v.*

Abington Friends Sch., 480 F.3d 252, 256 (3d Cir. 2007) ("A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof."), citing *Anderson* and *Celotex Corp.* Recently, the United States Supreme Court "emphasized, [w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott v. Harris,* 550 U.S. 372 (2007) (internal quotations omitted), quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-587 (1986).

In deciding a summary judgment motion, a court must view the facts in the light most favorable to, draw all reasonable inferences, and resolve all doubts, in favor of the nonmoving party. *Doe v. County of Centre, PA,* 242 F.3d 437, 446 (3d Cir. 2001); *Woodside,* 248 F.3d at 130; *Heller v. Shaw Indus., Inc.,* 167 F.3d 146, 151 (3d Cir. 1999). Further, a court must not engage in credibility determinations at the summary judgment stage. *Simpson v. Kay Jewelers, Div. of Sterling, Inc.,* 142 F.3d 639, 643 n. 3 (3d Cir. 1998), quoting *Fuentes v. Perskie,* 32 F.3d 759, 762 n.1 (3d Cir. 1994).

B. Substantive Principles – the *Clackamas* Test

In order to make a claim under Title VII, the FLSA or the PHRA, Ms. Kirleis must first establish that she was an employee of DMC, at all times relevant to her claims. Title VII, the FLSA[9] and the PHRA[10] were meant to protect only "employees and potential employees," therefore, it is critical to make the distinction between employees and employers. *Serapion v. Martinez,* 119 F.3d 982, 985 (1st Cir. 1997).

There is no dispute between the parties that the question of whether Ms. Kirleis is an employee is a "preliminary threshold issue" and that plaintiff bears the burden of proving that she was an employee, not an employer.[11] *See Steelman v. Hirsch,* 473 F.3d 124,

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[9] The Supreme Court in *Darden* noted that because of the statutory definition of the verb employ, the term employee has a much broader meaning under the FLSA. That definition "stretches the meaning of 'employee' to cover some parties who might not qualify as such under strict application of traditional agency law principles." *Darden,* 503 U.S. at 326. The parties herein, however, do not suggest that the meaning of "employees" under the FLSA should be judged by any standard other than *Clackamas.*

[10] In the case of the PHRA, the Court of Appeals in *Goosby v. Johnson & Johnson Medical, Inc.*, determined that "[t]he analysis required for adjudicating [a] claim under PHRA is identical to a Title VII inquiry." *Goosby,* 228 F.3d 313, 317 (3rd Cir. 2000).

[11] The parties treat this threshold issue as a question of jurisdiction. It is not. In *Arbaugh v. Y&H Corp.*, the Supreme

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128 (4th Cir. 2007) (citing *Benshoff v. City of Virginia Beach,* 180 F.3d 136, 140 (4th Cir. 1999)) ("A plaintiff bears the burden of establishing that she is an employee."); *Simpson v. Ernst & Young,* 100 F.3d 436, 439 (6th Cir. 1996) ("the distinction between a partner and an employee . . . is a preliminary jurisdictional issue."). Moreover, "a single individual in a single occupational setting cannot be both an employer and an employee." *Ziegler v. Anesthesia Assocs. Of Lancaster, Ltd.,* 74 Fed.Appx. 197 (3d Cir. 2003) (finding four shareholder-physicians to be employers) (quoting *Serapion,* 119 F.3d at 985); *Devine v. Stone, Leyton & Gershman, P.C.,* 100 F.3d 78, 80-81 (8th Cir. 1996), *cert. denied,* 520 U.S. 1211 (1997).

While the anti-discrimination statutes define the term "employee," the definition is "completely circular and explains nothing." *Clackamas,* 538 U.S. at 444 (quoting *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322 (1992)). Title VII and the PHRA define

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Court resolved a split among the Courts of Appeals and explicitly held that the question of whether a person is an employee for purposes of the numerosity requirement is not jurisdictional, but rather a threshold question going to the merits of plaintiff's Title VII claim. *Arbaugh,* 546 U.S. 500, 515-16 (2006), *overruled on other grounds* ("when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character. . . . "[W]e hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."). If the numerosity requirement is not jurisdictional, certainly the employee-employer issue is not a matter of jurisdiction.

the term "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f), 29 U.S.C. § 203(e) and 43 P.S. § 954(b). Thus, the EEOC and the Supreme Court had to look outside the statutes for guidance.

In *Clackamas*, the Supreme Court agreed with the EEOC that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Clackamas*, 538 U.S. at 445 (quoting *Darden*, 503 U.S. at 322-23). The master-servant relationship is generally described as a relation where "the employer has the right to select the employee, the power to remove and discharge him and the right to direct both what work shall be done and the manner in which it shall be done." *Blacks Law Dictionary*, 879 (5th ed. 1979).

Prior to *Clackamas*, there had been a split among the Courts of Appeals as to how to define the term "employee" in the context of a professional organization, in a meaningful and workable manner. The Court of Appeals for the Seventh Circuit applied an "economic realities" test. The economic realities test considered myriad facts and circumstances regarding the professional organization and its professional members, generally concluding that a shareholder in a professional corporation is more analogous to a general equity partner in a partnership, who is an "employer," than it is to a shareholder of a general corporation. *Clackamas*, 538 U.S. at 442 (citing

EEOC v. Dowd & Dowd, Ltd., P.C., 736 F.2d 1177, 1178 (7th Cir. 1984)).[12] The Supreme Court declined to follow the economic realities test to the extent that the analysis of "employer-employee" status ceased once a court determined the individual was akin to a partner in a partnership, who is always deemed to be an employer. *Clackamas*, 538 U.S. at 446 ("The question whether a shareholder-director is an employee, however, cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner. Today there are partnerships that include hundreds of members, some of whom may well qualify as "employees" because control is concentrated in a small number of managing partners. Cf. *Hishon v. King & Spalding*, 467 U.S. 69, 79, n. 2 (1984) (Powell, J., concurring) ("[A]n employer may not evade the strictures of Title VII simply by labeling its employees as 'partners' ")").

The Supreme Court also rejected the approach taken by the Court of Appeals for the Second Circuit, an even more categorical, "employee friendly" approach, wherein professional corporations are viewed

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[12] In evaluating the "economic realities" of the professional business relationship, the following factors are considered: the permanency of the relationship; the degree of skill required for the particular job; the worker's capital investment; the opportunity for profit or loss; the employer's right to control; and whether the worker was an integral part of the employer's business. See *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984) (citing *Real v. Driscoll Strawberries Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979).

in the corporate format, and individuals who work for a professional corporation must be considered to be employees of the corporation. In *Hyland v. New Haven Radiology Assocs.*, the Court of Appeals stated that the "incorporators of a professional corporation make a deliberate decision to adopt the corporate form for their business in order to avail themselves of important tax, employee benefit, and civil liability advantages. Having freely made the choice to adopt this form of business organization they should not now be heard to say that their firm is essentially a . . . partnership and not a corporation." *Hyland*, 794 F.2d 793, 798 (2d Cir. 1986) (after electing to do business in a corporate form, defendant can not later assert that in economic reality the business was a partnership and that the plaintiff was a partner.).

The Court in *Clackamas* rejected both of these categorical approaches, and adopted the functional test developed by the EEOC, the agency charged with enforcing the anti-discrimination statutes,[13] to resolve the question of who qualifies as an employee.

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[13] In *Clackamas*, Plaintiff had filed suit under the Americans with Disabilities Act (ADA). However, the EEOC is also responsible for administration of Title VII. Further, the EEOC's manual states that it applies across the board to other federal anti-discrimination statutes, including the FLSA, also known as the Equal Pay Act (EPA). See *Clackamas*, 538 U.S. at 444 fn. 3, See also, *Serapion*, 119 F.3d at 985 (statutes with similar definitions of the term employee are regarded as being "*in pari passu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another.")

Clackamas, 538 U.S. at 448. The EEOC had adopted a "master-servant control" test that focuses on the common-law touchstone of control to determine whether a person is an employee or an employer. *Clackamas*, 538 U.S. at 440 (citing 2 EEOC Compliance Manual § 605.0009 (2000)). This test sets forth six factors to be considered when determining "whether an individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Clackamas*, 538 U.S. at 449-50 (quoting 2 EEOC Compliance Manual § 605.0009 (2000)). These six factors are as follows:

> Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
>
> Whether and, if so, to what extent the organization supervises the individual's work.
>
> Whether the individual reports to someone higher in the organization.
>
> Whether and, if so, to what extent the individual is able to influence the organization.
>
> Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
>
> Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449 (quoting 2 EEOC Compliance Manual §605.0009 (2000)).

The six *Clackamas* factors are not exhaustive and "the answer to whether a shareholder-director is an employee depends on all the incidents of the relationship . . . with no one factor being decisive." *Clackamas,* 538 U.S. at 450-51, n.10 (internal quotations omitted). Moreover, a person's title and labels on documents are not determinative of whether the person is an employee for whom protections should be afforded under anti-discrimination laws, so titles such as "partner" and "shareholder" are not dispositive. *Id.,* at 450. There is no "shorthand formula or magic phrase" that is determinative of the issue whether a person is an employee, which must be determined on a case by case basis with reference to the totality of the facts. *Clackamas,* 538 U.S. at 449, n.10.

While *Clackamas* analyzed the term employee with regard to whether an employer met the fifteen employee threshold under the ADA, the Supreme Court also stated that the same analysis is appropriate in determining whether a plaintiff qualifies as an employee, and therefore is protected by the ADA. *Clackamas,* 538 U.S. at 444 n.3 and 446 n.6.

In summary, the Supreme Court stated:

> As the EEOC's standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can

> assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. The mere fact that a person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor. See ibid. ("An individual's title . . . does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee"). Nor should the mere existence of a document styled "employment agreement" lead inexorably to the conclusion that either party is an employee. See ibid. (looking to whether "the parties intended that the individual be an employee, as expressed in written agreements or contracts"). Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden,* the answer to whether a shareholder-director is an employee depends on "'all of the incidents of the relationship . . . with no one factor being decisive.'"

Clackamas, 538 U.S. 449-50 (footnotes and citations omitted).

III. Facts of Record

Unless otherwise indicated, the following facts of record, adduced from the summary judgment supporting materials, either are not in dispute or are historical facts the substance of which has not been

challenged, even though the parties may "deny" some statements based on divergent inferences drawn therefrom or for some other non-content related reason.

A. Background

DMC is a Pittsburgh based professional corporation at which Ms. Kirleis has practiced law for over twenty years: ten years as an associate attorney, three years as a Class B Shareholder, and for almost nine years, as a Class A Shareholder/Director. Plaintiff's election as a Class A Shareholder/Director of the Firm, effective January 1, 2001, was made in accordance with an election held pursuant to Section 3.08 of DMC's By-Laws. Although plaintiff maintains that in practice, the DMC By-Laws are not routinely followed or distributed to Shareholders, and that she never received a copy or saw the By-Laws until after she commenced this litigation, the relationship between DMC's Shareholders, associate attorneys and staff officers and employees and the professional corporation is ostensibly governed by detailed By-Laws of the corporation.

B. By-Laws

Pursuant to the By-Laws, all Class A Shareholders are members of DMC's Board of Directors. The only differences between a Class B Shareholder and a Class A Shareholder/Director are that Class B Shareholders cannot vote (nor can associate attorneys

or other staff employees), are not Directors of the Firm, and are not eligible for certain benefits for which Class A Shareholder/Directors are eligible.

As noted, section 3.08(g) of the By-Laws provided Kirleis with a car allowance, parking lease, annual trip to a legal seminar or convention with airfare included plus spending allowance, reimbursement of 70% of annual country club dues, and a life insurance policy. In addition to these benefits, Ms. Kirleis also accepted (1) compensation pursuant to Section 4.03(h) of the By-Laws; (2) a position on the Board of Directors pursuant to Section 2.02; and (3) a right to vote on all DMC matters reserved to the Board, pursuant to Section 1.03(b). Class B Shareholders are not eligible for the car lease allowance of $600 per month, insurance on the car or the annual legal seminar or convention trip.

Plaintiff does not deny the substance of these historical facts, but she vigorously denies that the conferral and acceptance of these benefits were "pursuant to the By-Laws." Plaintiff's persistent refrain regarding the effect of the DMC By-Laws is that up until this litigation, she had not been given a copy of the By-Laws, had never actually seen the By-Laws, and never asked to see the By-Laws because she "understood" they were in the process of being revised, and were in a "state of flux." (As discussed more fully, infra, plaintiff does not offer any facts to contradict defendant's averment that the By-Laws were always available to any Shareholder/Director.)

The DMC By-Laws[14] specifically reserve certain decisions to the Board of Directors and provide, among other things:

> (a) Section 3.08 of the By-Laws specifically reserves to the Board of Directors as a whole, of which Plaintiff is one, decisions regarding:
>
> > (i) Any matter which requires a three-fourths vote of all of the Class A Shareholders, including, but not limited to, the making and/or removing of Shareholder/Directors and amendment of the By-Laws;
> >
> > (ii) Approval of any and all mergers and acquisitions;
> >
> > (iii) Approval of new offices and/or the location of the Firm's existing offices;
> >
> > (iv) Approval of the Firm's annual expense budget;
> >
> > (v) Approval of long-range business and marketing plans; and
> >
> > (vi) Changes to the Firm's profit sharing plan and determination of benefits.
>
> (b) Section 3.01 of the By-Laws specifically reserves to the Board of Directors as a

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[14] There were two sets of By-Laws in effect during relevant time periods: By-Laws effective April 13, 1993 (Doc. No. 144-13), and By-Laws effective April 5, 2007 (Doc. No. 133-3).

> whole, of which Plaintiff is one, decisions regarding election of the Firm's officers every two years.
>
> (c) Section 4.03 of the By-Laws specifically reserves to the Board of Directors as a whole, of which Plaintiff is one, decisions regarding election of the members to the Firm's Executive Committee each year, with seats held on staggered terms.
>
> (d) Section 4.02 of the By-Laws specifically reserves to the Board of Directors as a whole, of which Plaintiff is one, decisions regarding election of Chairpersons of the Firm's Committees every two years.
>
> (e) Section 10.01 of the By-Laws specifically reserves to the Board of Directors as a whole, of which Plaintiff is one, decisions regarding any amendments to the By-Laws.

Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 132), at ¶ 35.[15]

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[15] Although plaintiff argues that these By-Laws are not dispositive because she had not seen them, and because they have not been enforced or followed in practice, she notes that Section 3.08 of both sets of By-Laws are the same. See Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts Supporting Defendant's Motion for Summary Judgment (Doc. No. 132) and Plaintiff's Statement of Additional Material Facts" ("Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts") (Doc. No. 143), at ¶ 35. The Court notes that section 103 and 206 of the By-Laws, quoted verbatim in text, infra, are also identical.

The By-Laws also create the Executive Committee, a standing committee of the Board of Directors, pursuant to section 4.03, which provides, in most relevant part, as follows:

> (a) Pursuant to Section 4.03(a) of the By-Laws, the Executive Committee is compromised [sic] of the President, the Managing Director, and ten other Class A Shareholders, six of whom are elected by the Board of Directors, and four of whom are appointed by the President.
>
> (b) Pursuant to Section 4.03(a) of the By-Laws, those Class A Shareholders elected to the positions of Secretary/Treasurer, General Counsel, and Marketing Director by the Board of Directors also serve as ex-officio members of the Executive Committee.
>
> (c) Pursuant to Section 4.03(a) of the By-Laws, ex-officio members of the Executive Committee vote on all matters except compensation.
>
> (d) Pursuant to Section 4.03(b) of the By-Laws, Executive Committee terms are for three years.
>
> (e) Pursuant to Section 4.03(e) of the By-Laws, the Board of Directors has delegated certain decisions to the Executive Committee, including:
>
> (i) The determination of compensation to be paid to all Shareholders, Officers, Directors, and employees of the Firm;

(ii) Any changes or adjustments to the capital contributions to the Firm by its Shareholders;

(iii) The establishment and maintenance of reasonable reserves to meet the anticipated capital needs of the Firm; and

(iv) All other Firm matters not specifically reserved to the Board of Directors under Section 3.08 of the By-Laws.

(f) Pursuant to Section 4.03(f) of the By-Laws, the Board of Directors has absolutely delegated responsibility in areas (i) through (iv) above to the Executive Committee and has provided the Executive Committee with "full discretion and authority to act" in these areas.

(g) Pursuant to Section 4.03(f) of the By-Laws, all books and records of the Executive Committee must be open to inspection by all Shareholders, with the exception of those records relating to compensation paid, or to be paid, to Officers, Directors, or Shareholders.

(h) Pursuant to Section 4.03(f) of the By-Laws, records relating to compensation paid, or to be paid, to Officers, Directors, or Shareholders must remain confidential "unless disclosure of all or any part thereof shall be required by a majority vote of the Class A Shareholders."

> (i) Pursuant to Section 4.03(g) of the By-Laws, any Shareholder may attend any meeting of the Executive Committee, and any Shareholder may review the minutes of any meeting of the Executive Committee, with the exception of any meeting where compensation is set.

Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 132), at ¶ 113.[16]

Additionally, pursuant to Section 4.03(h) of the By-Laws:

> The compensation, including both salary and bonus, of each shareholder shall be determined by the committee by fixing, at the beginning of each fiscal year, such Class A and Class B shareholder's percentage interest of the net profits of the corporation. For these purposes, "net profits" means the profits of the corporation prior to payment of

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[16] Section 4.03, EXECUTIVE COMMITTEE, appears in the 2007 By-Laws, and does not appear to have an exact counterpart in the 2003 By-Laws. See note 8, supra. Under section 403 of the 2003 version, exclusive authority to set compensation, fringe benefits, etc., and confidentiality of records relating to compensation, were reposed in a Compensation Committee. There do not appear to be any substantive or material differences between the versions with regard to the authority of the Compensation and the Executive Committees, and plaintiff does not suggest otherwise. See Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 143), at ¶ 113. The references in text are to the 2007 version of the By-Laws.

> compensation to any shareholder of the corporation. The manner of payment of such compensation, the allocation of compensation between salary and bonus, and any decision regarding the borrowing and repayment of funds to pay compensation shall be exclusively within the discretion of the Committee.

By-Laws, Section 4.03(h).

D. Operation of the By-Laws

The actual operation of the By-Laws is the primary point of contention in the determination of whether plaintiff is an employer or an employee. DMC contends that the By-Laws run DMC; pursuant to those By-Laws, as written and in practice, plaintiff is an owner and manager of the professional corporation under the *Clackamas* control test, and therefore is an employer. Although certain matters are delegated, with "full discretion and authority to act," to the Executive Committee, any Class A Shareholder/Director, including plaintiff, may be elected to and serve on the Executive Committee, and the powers and authority of the Executive Committee may be circumscribed or enhanced by amendment to the By-Laws by 3/4 of the Class A Shareholder/Directors cligible to vote.

Plaintiff denies the significance of the authority granted Class A Shareholder/Directors by the By-Laws, and downplays the significance of their participation in Board of Directors meetings. Moreover,

plaintiff never received a copy of the By-Laws, although she reluctantly concedes that she never asked to see a copy because, as she asserts repeatedly, she "understood" the By-Laws were in the process of being revised and were in a "state of flux," and "understood" that she would not have been able to see them, even though they were available at all times. (Plaintiff does not specifically dispute DMC's statement that the By-Laws were always available to any Shareholder/Director, based solely on her "understanding" that they were being revised and were in a "state of flux.") Plaintiff also maintains that the By-Laws are mostly a theoretical document largely ignored by the Executive Committee, and that, in practice, DMC is supervised, run and managed by a small group of Class A Shareholder/Directors on the Executive Committee.

According to plaintiff, for the period from January of 2001 through 2008, nine members of the Executive Committee, who constitute a majority of the membership of the Executive Committee, remained the same: James Miller, Jeffrey Wiley, Daniel Stefko, John Pion, Charles Brown, Steven Houghton, Joseph Christof, Robert Marino and John Wall. See Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts Supporting Defendant's Motion for Summary Judgment (Doc. No. 132) and Plaintiff's Statement of Additional Material Facts" ("Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts") (Doc. No. 143), at ¶ 217. Also, during the relevant time period,

Wilbur McCoy Otto, Jeffrey Wiley, Daniel P. Stefko, Marcelle Theis and John Conti, who are the individuals who assigned and monitored the work for the university [sic] of Pittsburgh Medical Center ("UPMC"), which is and was DMC's largest client, were or are members of the Executive Committee. *Id.* at ¶¶ 218-222.

Mr. Otto, who was the President of DMC and the Chair of the Executive Committee, appointed Theis and Conti to the Executive Committee in 2004. *Id.* at ¶¶ 218, 220. Mr. Otto was, at all relevant times, General Counsel for UPMC's captive insurance carrier, the University Health Center of Pittsburgh Insurance Program ("UHCP"), which had been a long-standing and significant client of DMC. (DMC's relationship with UPMC and the UHCP Insurance Program dates back more than thirty years.)

Contrary to DMC's assertions, Kirleis claims that her membership on DMC's Board of Directors, which is comprised of all Class A Shareholders (ranging in number during the relevant period from 61 to 69 persons), does not afford her the "ability or opportunity to make decisions for the firm or to even offer meaningful input into or influence over decisions to be made regarding the business, management and operation of the firm. Rather, the Board of Directors' participation in management decisions is merely a pro forma after-the-fact ratification or rubber stamp of decisions already made and actions already taken by the Executive Committee prior to any given

monthly Board meeting." Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment (Doc. No. 130) (Doc. No. 142), at 2-3.

E. Board of Directors Meetings

All significant DMC business is proposed by the Executive Committee or other Class A Shareholder/Directors and conducted by vote at meetings of the Board of Directors. Pursuant to Section 2.04 of the By-Laws, the Board of Directors meets once a month, every month of the year, on meeting dates that are set and published on DMC's intranet at the beginning of each year; monthly reminders of the meetings are sent each month on the intranet to each Shareholder/Director, and the agenda for each meeting is circulated to all Shareholder/Directors in advance of each meeting. (Plaintiff asserts that the agendas are set by the Executive Committee and that the agenda descriptions are vague.)

No associate attorney or other employee may attend Board of Directors meetings unless they are specifically invited to do so. All Shareholder/Directors, can attend, or not attend, any or all of these meetings as the Shareholder sees fit, and if unable to attend any meeting of the Board of Directors in person, he or she can attend by phone or proxy. Since 2001, Plaintiff has attended 42 of the 96 Board of Directors meetings held through May 2009. Minutes of all meetings of the Board of Directors are recorded by the Firm's Controller, Jay Schwartz, and

copies of the minutes of each meeting are circulated to all members of the Board following each meeting. Further, at the commencement of each meeting of the Board of Directors, there is a motion to approve the minutes of the last meeting of the Board, and if no Shareholder/Director voices concern that the minutes are inaccurate, the minutes are ratified by the Board.

F. Quorum of Board of Directors

A major undisputed factor upon which Ms. Kirleis relies concerns the make-up and decisions made at Board of Directors meetings conducted from 2001 through June of 2009, as reflected in the minutes of those meetings. DMC does not contest plaintiff's factual assertions that 88 of 97 Board of Directors meetings during that period were conducted without a quorum of those Board of Directors *eligible to vote* being present at the meetings, in support of her argument that the Board of Directors merely "rubber stamped" the Executive Committee which had already made the decisions and simply obtained oral ratification from the members of the Board of Directors present at the meetings. See, e.g., Plaintiff's Response to Concise Statement of Undisputed Material Facts, (Doc. No. 143), at ¶¶ 639-784. DMC claims, on the other hand, that the By-Laws did *not* mandate a quorum of all *eligible* Class A Shareholder/Directors to make most decisions and policies, but only a quorum of those *present or participating by telephone or proxy* at the Board of Directors meetings, under section 2.06(a) and (b) of the By-Laws, and that

the custom and practice of DMC Board of Directors meetings consistently followed this interpretation of the By-Laws in enacting resolutions, making policy decisions and conducting other business.

The Court agrees that the By-Laws, by their plain meaning, support the custom and practice at DMC regarding business transacted at Board of Directors meetings. Article I, MEETINGS OF SHAREHOLDERS, provides in relevant part as follows:

> (a) QUORUM: At all meetings of the shareholders, the *presence in person, by telephone or by written proxy of at least a majority of the Class A shareholders shall be necessary and sufficient to constitute a quorum for the transaction of business. If a quorum is not present* at any meeting, the meeting *may be adjourned* from time to time by a majority of the Class A shareholders present, until a quorum, shall be present; but immediate written notice of the date, time, and place to which such meeting is adjourned shall be given to any shareholder not present at the meeting.
>
> (b) VOTING: At any duly convened meeting of the shareholders resolutions on *the following matters shall require the affirmative vote of a three-fourths (3/4ths) majority of all the Class A shareholders* to be adopted; (i) Termination of employment of any shareholder employee; (ii) Election of any new shareholder-employee; (iii) Adoption, amendment or repeal of these By-Laws,

> and (iv) Dissolution of the corporation. *In all other cases,* resolutions of the shareholders shall require the *affirmative vote of a simple majority of the Class A shareholders present in person, by telephone or by proxy* to be adopted, except as otherwise provided by law. Class B shareholders shall have no vote either as shareholders or committee members.

Section 1.03(a) and (b).

Article II spells out the role and duties of DMC's Directors. Section 2.06, ORGANIZATION AND MANNER OF ACTING, provides in relevant part as follows:

> (a) QUORUM. At all meetings of the Board of Directors, the presence in person or by telephone of at least *a majority of the Directors in office* shall be necessary and sufficient to constitute a quorum for the transaction of business. *If a quorum is not present* at any meeting, *the meeting may be adjourned* from time to time by a majority of the directors present, until a quorum shall be present. . . .
>
> (B) VOTING. At any duly convened meeting of the Directors, resolutions or other actions of the Board *shall require the affirmative vote of a simple majority of the Directors present in person, by telephone, or by written proxy to* be adopted, except as otherwise expressly required herein or by law.

Section 2.06(a) and (b).

The Court agrees that the above quoted language supports DMC's interpretation of its By-Laws that, except for the matters set forth in section 1.03(a)(i)-(iv), a simple majority of the Shareholder/Directors *present* in person, by telephone, or by proxy suffices for voting on resolutions and other DMC actions. While a quorum of the Board of Directors is defined as "the presence in person or by telephone of at least a majority of the Directors *in office*," Section 2.06(a), a majority of the Directors present "may" (discretionary) adjourn any meeting having less than a quorum of eligible Directors. Section 2.06(b), however, provides that resolutions and other actions of the Board "shall require" (mandatory) "the affirmative vote of a simple majority of the Directors *present* in person, by telephone, or by written proxy. . . ."

Moreover, it is undisputed that 88 of 97 Board of Directors meetings proceeded without a quorum of all eligible Class A Shareholder/Directors being present, and that important DMC resolutions, decisions and policies were routinely made at said meetings and thereafter followed, consistent with DMC's interpretation of the By-Laws. Thus, it cannot be disputed that it was the custom and practice at DMC to transact business and make decisions at Board of Directors by the affirmative vote of a simple majority of the Directors *present* in person, by telephone, or by proxy.

In addition, plaintiff was present at 42 of the meetings, and there is no indication on the record that she ever objected to proceeding with any meeting without a quorum of all eligible Class A Shareholder/

Directors present, or otherwise challenged resolutions and other business decisions that had been made at such meetings,[17] and the summary judgment record does not show that any other Shareholder/Director so objected to the conduct of the meetings or decisions made at said meetings as being ultra vires.

G. Business Conducted at Board of Directors Meetings

A wide variety of DMC business is discussed and conducted at Board of Directors meetings, as reflected in the minutes of the meetings. See, e.g., Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 132), at ¶¶ 34(a)-(k), 42(a)-(iiii); Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 143), at ¶¶ 34(a)-(k), 42(a)-(iiii). For example, business conducted at Board of Directors meetings includes, but is not limited to, the following: discussion of financial information and policies; the potential of opening new offices in other locales; discussion of sub-committees' work and make-up; nominations for and voting on elections of new Class A Shareholder/Directors; selection of summer law clerks from whom new associates are hired; hiring of new associates. There

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[17] To be sure, plaintiff asserts that any such objections would have been meaningless, and that Shareholder/Directors were intimidated from voicing opposition by Mr. Otto and other members of the Executive Committee who, she argues, controlled their work and livelihoods.

is no need to go into greater detail at this point; suffice it to say for now that a wide range of business is conducted and decisions and policies are made at such meetings pursuant to DMC's custom and practice.

For the most part, plaintiff does not dispute the content of the minutes of the Board of Directors meetings, but she strongly argues that the meetings are meaningless. Plaintiff asserts that these meetings are mere "rubber stamps" for decisions already made by the Board of Directors and that non Executive Committee Directors do not meaningfully participate in the Board of Directors meetings and decisions, and for that reason, many Shareholders often choose not to attend. Further, plaintiff claims that the Executive Committee does not merely organize or recommend actions to the Board of Directors, but instead, makes all decisions regarding the management and operation of DMC in advance of meetings, and presents their decisions to the Board of Directors of DMC for an "after-the-fact oral ratification or rubber stamp," frequently by oral yea or nay votes prefaced by a request for a showing or sign of support for what the Executive Committee has already decided or done; the Executive Committee controls its own membership by not taking nominations for open positions, but by simply proffering the member whose term is expiring as the only "nominee." Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 143), at ¶¶ 34(a)-(k), 42(a)-(iiii), 519.

While the minutes support plaintiff's position in that the great majority of the Shareholder/Director votes at DMC Board of Directors approve motions and proposals made by the Executive Committee, this is not always the case. Plaintiff herself, and other non Executive Committee Shareholders, have participated in policy decisions and have opposed certain Executive Committee positions, and have sometimes prevailed, sometimes not. For example, the minutes of meetings reflect that plaintiff opposed elections of Class A Shareholder/Directors even though they had been recommended by the Executive Committee, and that her view had prevailed. The minutes also reflect that at times there were multiple applicants for vacancies on the Executive Committee and competition amongst Class A Shareholder/Directors, and that the positions were not simply filled by adopting a "slate" proposed by the Executive Committee, and that sub-committees had been formed, with plaintiff as chair or co-chair, to gather the nominations and organize the ballots. Also at series of Board of Directors meetings, various important policies were adopted after input from sub-committees including advocacy by non Executive Committee Shareholder/Directors, such as the Work/Life Balance Policy, the Maximum Yearly Billable Hour Policy and policy related to the composition of and age and term limits for the Executive Committee which was authored and advocated by six Shareholder/Directors, four of whom were not and had never been members of the Executive Committee. See Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 132) at

¶¶ 43(a)-(iiii), 44-50, and Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 143) at ¶¶ 43(a)-(iiii), 44-50.

Other pertinent facts will be discussed in section V, below, applying the law to the facts, as relevant to the particular *Clackamas* factor heading in which it has been placed.

IV. Application of the six *Clackamas* Factors

The Court notes that the six EEOC/*Clackamas* factors are somewhat overlapping, so that particular facts might logically be placed in more than one category. Moreover, the six factors are non-exhaustive, and all of the factors and any other important facts or circumstances must be considered and weighed together, with no one factor being talismanic. Further, many of the facts adduced by the parties are not material to the issues discussed herein or are redundant or cumulative of other representative facts, and have not been discussed in this opinion.[18] With that preface, the Court will discuss the six EEOC/*Clackamas* factors, seriatim.

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[18] Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 132) contains 194 numbered paragraphs. Plaintiff's Response to Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 143) sets forth responses to defendant's 194 numbered material facts, and an additional 726 material facts to which DMC has responded.

A. Whether the organization can hire or fire the individual

Hiring

All Shareholders of either Class A or B are elected and invited to join DMC as a Shareholder by a 3/4 majority of the Class A Shareholder/Directors, as section 103(b) of the By-Laws and the minutes of meetings demonstrate. Plaintiff herself participated in many of these meetings for election of new Shareholders. Plaintiff was elected to the Board of Directors pursuant to the By-Laws as a Class A Shareholder/Director in 2001, and she accepted the offer to become a Class A Shareholder/Director effective January 1, 2001. At that point, plaintiff had the authority under section 103(b) to "hire" (i.e., elect) new Shareholders, although it is an authority shared equally by all Class A Shareholder/Directors.

Firing

Whether the organization can "fire the individual" is a factor that weighs in favor of DMC. Pursuant to the By-Laws, a Class A Shareholder/Director may only be terminated "for cause" by 3/4 of DMC's eligible Board of Directors. By-Laws, sections 103(b) and 209. In Pennsylvania, a by-law is a contract among shareholders. *Hornsby v. Lohmeyer,* 72 A.2d 294, 299, 364 Pa. 271, 271 (1950). DMC's By-Laws provide substantial protection to its Shareholders, requiring a 3/4 vote of Class A Shareholder/Directors who may only terminate the individual for cause.

Constructive discharge

Plaintiff asserts, however, that this protection is an illusion that evaporates when exposed to the actual practice at DMC to, essentially, constructively discharge any Shareholder the Executive Committee decides should be terminated. According to plaintiff, the Executive Committee accomplishes this action in the following manner.

When the members of the Executive Committee want to terminate the employment of a shareholder attorney, they reduce the amount of work (especially work for UPMC, the primary client for DMC) assigned to the attorney, and "as a result of the reduction in work, the billed hours and profitability of the attorney go down, thereby giving the Executive Committee reason to lower the compensation paid to the attorney. With repeated reductions in compensation or the threat of reduction in compensation, the attorney becomes frustrated and leaves the firm giving the members of the Executive Committee what they wanted; i.e. the termination of the attorney's employment with DMC." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 142) at 4-5. In support, in addition to her own subjective opinion, based upon 22 years with DMC, plaintiff offers the affidavits of Hunter A. McGeary, Jr. and David M. Neuhart, former Class A Shareholder/Directors of DMC, who "testified in their affidavits that they were targeted by the Executive Committee in this manner. McGeary left DMC as a result of the Executive Committee's threat to reduce

his salary. Neuhart left DMC as a result of actual reductions in his salary made by the Executive Committee." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 142) at 5 (paragraph references to Plaintiff's Statement of Additional Facts omitted) (Affidavits at Doc. No. 144-25).

Despite the subjective opinions of three Class A Shareholder/Directors, which the Court certainly credits for purposes of the motion for summary judgment, the Court finds, as a matter of law, that there is no genuine issue of material fact-and that reasonable jurors would find – that only 3/4 of the eligible Class A Shareholder/Directors, such as plaintiff, can terminate DMC Shareholders, and then only for cause.

Effect of By-Laws

Plaintiff would have this Court completely ignore the By-Laws, including their very clear protections to Class A Shareholder/Directors in requiring a 3/4 vote of fellow Class A Shareholder/Directors to terminate for cause. Under Pennsylvania law, a by-law is a contract among shareholders, *Hornsby*, and shareholders and officers of a corporation are presumed to know the corporation's by-laws. Section 1505 of Pennsylvania Statutes and Consolidated Statutes, title 15, provides: "Except as otherwise provided by section 1713 (relating to personal liability of directors) or any similar provision of law, the bylaws of a

business corporation *shall operate only as regulations among the shareholders, directors and officers of the corporation* and shall not affect contracts or other dealings with other persons unless those persons have actual knowledge of the bylaws." 15 Pa.C.S. § 1505. DMC, a professional corporation, is governed by the same rules as other domestic corporations in Pennsylvania unless otherwise provided in Chapter 29, "Professional Corporations." 15 Pa.C.S. § 2901(c).

Plaintiff does not claim that any provision of the laws pertaining to professional corporations are inconsistent with 15 Pa.C.S. § 1505, but argues that she is, in fact, an employee and thus is an "other person" as set forth in section 1505, and that under the last portion of section 1505, she cannot be bound by the By-Laws unless she had "actual knowledge" of them. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 142) at 29. There can be no doubt, however, that Ms. Kirleis is a Class A Shareholder/Director of DMC, and under the plain and unambiguous first portion of section 1505, the By-Laws are effective and operational between Shareholder/Directors at DMC. Thus, plaintiff's actual knowledge of the By-Laws is not required to bind her. Plaintiff presumptively knows, or at least is charged with knowing, the By-Laws.

Statutorily, therefore, plaintiff and the two former shareholders who believed they were constructively discharged, presumptively knew they could only be terminated from DMC for cause, and only by 3/4 vote of their colleagues. As a matter of common

sense and experience, this statutory presumption is strengthened here, where plaintiff and the other shareholders are all sophisticated attorneys (plaintiff having 22 years of legal experience as an attorney) with knowledge of the law and where to find it.

Faced with a constructive discharge, in the manner plaintiff asserts DMC acts when the Executive Committee wants to fire a Shareholder, it is difficult to fathom any attorney Shareholder not bringing the matter to a vote of the Board of Directors as is their right under the By-Laws. The two former shareholders who believe they were constructively discharged did not pursue their rights under the By-Laws, and, on the record before the Court, they apparently (i.e., the record does not show otherwise) reached mutual agreement (although perhaps not mutual satisfaction) as to the terms of their departures.

Plaintiff states (and the District Court and Court of Appeals for the Third Circuit agreed on the basis of the record at that time) that she never received a copy of the By-Laws, and that she understood them to be in revision and a "state of flux." However, DMC states, without substantive contradictory evidence offered by plaintiff, that the By-Laws were always available for any shareholder to see, and plaintiff reluctantly conceded (after evading a responsive answer for several pages of deposition testimony (Kirleis Deposition at 60-63, quoted in Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 132), at ¶ 13)), that she never actually

asked anyone to see the By-Laws. Whether they were in a state of flux or were in the process of being revised or not, the By-Laws existed somewhere at DMC, and plaintiff is charged with knowledge of the By-Laws by which she was hired and received compensation and benefits.[19]

Not asking to see the document that governs the terms of one's employment at a law firm approaches willful blindness. Complete disregard for the terms of the By-Laws cannot negate the legal effect of this governing document to the point where it means nothing.

Finding

The Court finds, therefore, that the Board of Directors, made up of all Class A Shareholder/ Directors, does the hiring and firing of individual Shareholders at DMC such as Ms. Kirleis. This factor weighs *heavily* in defendant's favor, therefore, in support of its position that plaintiff is, in fact, an "employer."[20]

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[19] It may have been a wiser practice for DMC to affirmatively distribute copies of the By-Laws to its shareholders, or at least provide each attorney Shareholder with a written notice as to where the By-Laws could be reviewed. This Court is not here, however, to determine the wisdom of DMC policies.

[20] Judge Lancaster found "compelling" defendant's argument, that "plaintiff, as a shareholder, can only be terminated by an official vote of three-fourths (3/4) of the shareholders [and] Plaintiff can speak and vote on the question of her own ouster,

(Continued on following page)

B-D. Whether the organization can set the rules and regulations of the individual's work; Whether and, if so, to what extent the organization supervises the individual's work; Whether the individual reports to someone higher in the organization

Because there is substantial overlap in this case with regard to these factors, the Court will consider record facts relevant to all of these factors in this section.

The Hierarchy at DMC

There is a defined hierarchy of attorneys and other workers at DMC in terms of authority and control over operations, both by the By-Laws and in practice. Plaintiff is in the second tier of the DMC hierarchy (although she is eligible for and could be elected to the first tier), which is structured as follows: the members of the Executive Committee, all of whom are Class A Shareholder/Directors; all other Class A Shareholder/Directors; Class B Shareholder/Directors; associate attorneys; non attorney administrators and officers, such as the Controller; secretaries, paralegals and other support staff.

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which is something associates are not allowed to do." *Kirleis*, 2007 WL 2142397 at *3. However, because defendant had not addressed plaintiff's contention "that the Executive Committee can force a shareholder from his or her position by controlling work assignments and compensation," the Court found that factor in favor of plaintiff at that stage of the proceedings. *Id.*

Access to Financial information

Class A Shareholder/Directors have access to a great deal of financial information about the Firm that those coming behind them in the hierarchy are not privy to.[21] This is an extraordinary amount of financial information that employees of most corporations, or non equity partners at law firm partnerships, would rarely be permitted to see. The conspicuous exception to the Shareholders' otherwise broad access to sensitive financial information is, of course, with regard to compensation of individual Shareholders. Plaintiff sees the withholding of that information and the ability of the Executive Committee to set compensation for individual Shareholders, with all records being confidential, as key to her lack of independence and her status as an employee. As a matter of law, this Court cannot agree.

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[21] The financial information include: what additional revenues must be received so that Shareholder/Directors will receive 100% of their annual projected distribution; the status of the line of credit borrowing; funding of the Firm's profit sharing plan; the Firm's actual billing compared to the Firm's budgeted billing and accounts receivable; billing projections by individual Shareholder/Directors, associates and paralegals, broken down by what was budgeted for the year; the actual annualized amount for the year and the actual amount for the preceding year; and detailed analyses of receipts and application of funds, actual to budget, with variances, with receipts set forth in six different categories, and expenses, including the gross number for shareholder compensation, set forth in forty-three different categories, among other information.

Section 4.03(f) of the By-Laws, provides that records relating to compensation paid, or to be paid, to Officers, Directors, or Shareholders must remain confidential "unless disclosure of all or any part thereof shall be required by a majority vote of the Class A Shareholders." Additionally, the manner of payment of shareholder compensation, allocation of compensation between salary and bonus, and decisions about borrowing and repayment of funds to pay compensation is "exclusively within the discretion of the [Executive] Committee." Section 4.03(h).

Although it is an important subject, the fact that this one area of DMC financial decisions is delegated exclusively to the Executive Committee does not mean that everyone else affected by this delegation of authority and confidentiality is an employee. Because a 3/4 majority of all Class A Shareholder/Directors may amend the By-Laws, including the compensation and confidentiality provisions, and because each has an equal vote in the matter, the fact that compensation is delegated to the Executive Committee and confidentiality mandated by the By-Laws, the Class A Shareholder/Directors retain the ultimate control over matters of compensation, unlike mere employees of a corporation.

Significant Differences of Authority Amongst Attorneys

Between Class A Shareholder/Directors and Class B Shareholders, associate attorneys and administrative and support employees, there are many

distinguishing features in terms of the control and authority set forth in the By-Laws and in practice. Among other things, Class A Shareholder/Directors are able to call special meetings, attend annual Shareholders' meeting, vote on termination, amendments and repeal of the By-Laws and dissolution of the Firm, vote to remove officers and to create new committees; no associate or other employee may do any of these things, and Class B Shareholders are not directors and have no vote. Thus, who "reports" to whom at DMC is not a simple question, and the answer will vary based upon where one is in the hierarchy and what particular matters are being reported.

Plaintiff has far more independence than Class B shareholders, associate attorneys and office staff and employees at DMC, but less than members of Executive Committee on a daily basis. However, as DMC argues, Class A Shareholder/Directors have equal authority under the By-Laws as members of the Executive Committee, except to the extent the By-Laws delegate areas and power to the Executive Committee. Again, plaintiff argues that the By-Laws are largely a sham, designed to give the appearance of authority and control to shareholders when in reality, plaintiff "reports to" the Executive Committee which calls all of the important shots. In reality, however, this Court finds that Class A Shareholder/Directors have less independence or control than DMC claims, but far more than plaintiff claims, as discussed below.

The UPMC Protocols

Plaintiff's principle argument that she has little actual independence with regard to UPMC cases, on which she is closely supervised and which constitute 90% of her practice at DMC, centers around the directives for case handling, rules and regulations that apply in each and every UPMC handled by DMC, to each and every attorney handling a UPMC case. These directives were initially, at relevant times, set forth in the "Otto memorandum" until mid-2004, and thereafter in the UPMC directives as enforced (according to plaintiff) by four members of the Executive Committee (Wiley, Stefko, Conti, and Theis). The Court will refer to these directives as the "UPMC protocols."

The UPMC protocols were designed to implement and ensure compliance with certain case handling procedures consistent with and reflective of UPMC's expectations and decisions relative to the defense of its insured entities and members in malpractice litigation. With regard to UPMC cases, plaintiff strenuously argues that she is not truly independent, because UPMC's protocols restricted her discretion in every UPMC case and subjected her to close supervision. The file handling procedures disseminated by Mr. Otto while General Counsel of UPMC's affiliated UHCP Insurance Program at the direction of the client were largely (but not solely) administrative and were designed to ensure uniformity and consistency among the many attorneys at DMC handling UPMC cases.

Each and every UPMC case assignment memorandum was accompanied by a copy of a 5 page memorandum of guidelines prepared by Otto and written on DMC stationery setting forth specific and detailed directions for handling UPMC cases. For example, Otto entered his court appearance in every case, and assigned the UPMC cases to DMC lawyers; he controlled all settlement discussions with clients and opposing counsel, and the assigned attorney could not even discuss settlement; the assigned attorney was required to file regular status reports on each case; the assigned attorney could not file cross claims or join any medical personnel or hospitals without Otto's approval, or even recommend such actions to anyone. On the other hand, Otto never attended trials or hearings, and the attorneys were permitted to prepare opening statements and closing arguments, witness preparation and depositions, prepare motions in limine, file preliminary objections, and take other independent actions in the direct litigation of UPMC cases. Otto might assign another associate attorney to assist, but plaintiff would supervise the associate.

Importantly, the rules and regulations for UPMC cases cannot be deemed to be exclusively *Mr. Otto's* directives, even though they were on DMC letterhead and were distributed and monitored in the "Otto memorandum" until mid-2004. The UPMC protocols were *undoubtedly* (i.e., it cannot be reasonably disputed from the record) approved and adopted by UPMC, by and through its captive insurance program,

UHCP, the principle client of DMC and of plaintiff. While plaintiff argues that Otto created these rules and regulations for handling UPMC cases while he was the President of DMC or Chair of the Executive Committee, she cannot and does not dispute that the "Otto memorandum" was written and distributed when Otto also wore the UHCP General Counsel hat (in addition to his DMC President/Chair hats), or dispute that UPMC and UHCP participated in creating the protocols in consultation with its General Counsel. Although plaintiff claims not to have known at the relevant time that Otto was also General Counsel for UHCP, she does not and cannot dispute that, in fact, he was General Counsel for UHCP, nor can she legitimately dispute (i.e., point to record evidence) that the rules and regulations for handling UPMC cases set forth in the "Otto memorandum" were created in consultation with the client, UPMC and UHCP, and adopted with their approval.

If there were any doubt that the UPMC protocols were those of UPMC and UHCP, not DMC or Otto, they were dispelled in mid-2004, when UPMC decided to form an in-house litigation group, and to distribute its cases to other law firms in addition to DMC. It was at this point, plaintiff alleges, that four members of the Executive Committee (Wiley, Stefko, Conti and Thess [sic].) formed a sub-committee to take control of UPMC cases in directing DMC Shareholders and attorneys as to how the UPMC cases were to be handled. The UPMC protocols as of mid-2004 were on UPMC stationary, and were distributed

to every attorney handling cases for UPMC, whether DMC lawyers or lawyers at other law firms. Many if not most of the UPMC protocols regarding such cases were adapted from the Otto memorandum.

Further, the UPMC protocols, either under Otto's memorandum or UPMC's own document, had to be followed by every attorney handling any UPMC cases, including members of the Executive Committee. To the extent plaintiff argues her independence was circumscribed by the UPMC protocols, so too was the independence of those members of the Executive Committee assigned to UPMC cases, who plaintiff claims are her employers.

A reasonable juror could not find plaintiff to be an employee based upon rules and regulations governing every attorney handling the Firm's largest client's cases, including attorneys who plaintiff claims are her employers on the Executive Committee. The record does not support the inference that Class A Shareholder/Directors are so closely supervised and their legal discretion so restricted in UPMC cases that they may be considered to be "employees."

Other Matters Bearing on Supervision and Control

UPMC is not DMC's only client, nor plaintiff's only client. Once a Shareholder's new origination is approved for conflicts and financial viability, a Shareholder retains almost complete autonomy with respect to any cases he or she originates. There is no

dispute that plaintiff maintained almost complete autonomy with regard to her own clients. She was free to turn down UPMC assignments like any of the Class A Shareholder/Directors (unlike Class B Shareholders and associates, who could not refuse an assignment) and to develop more of her own clientele. When she accepted UPMC assignments, plaintiff knew such cases were subject to the UPMC protocols, regardless of who was handling the case.

Plaintiff also set her own hours and work schedule, within the minimum and maximum billing hours adopted by the Board of Directors, could work from home, and could work on weekends or not. Associate attorneys and staff employees did not have the same flexibility in scheduling.

Plaintiff also maintains that she had little or no control over hiring of staff or their salaries, including her own secretary who was assigned by the office manager, that she could not write checks on behalf of DMC to cover even routine expenses, and that she had to seek prior approval from members of the Executive Committee before spending any DMC funds for client entertainment. As with the UPMC protocols, plaintiff was subject to the same rules and regulations with regard to these matters as were all other Class A Shareholder/Director's, except for those areas delegated to the Executive Committee, and plaintiff had more authority over these matters than did Class B shareholders and associate attorneys, who she could supervise to a significant extent,

especially in her capacity as Chair of the Associates Review Committee.

Based on all of the foregoing, the Court finds that plaintiff, as a voting Class A Shareholder/Director, had ultimate control over the rules and regulations of her work because she could promote and seek amendment to the By-Laws and other DMC practices and policies, that in practice she retains a significant degree of independence in her employment, that she supervises associate attorneys and staff members assigned to support her, and that she has meaningful opportunity to influence decisions at DMC. These three *Clackamas* factors, therefore, also favor a finding that plaintiff is not an "employee," and is instead an "employer" for purposes of the anti-discrimination laws.

E. Whether and, if so, to what extent the individual is able to influence the organization

Plaintiff served as a member of various sub-committees of DMC, including as Chair or Co-Chair. During the relevant time period, plaintiff held various management positions, including: Chair of the Associate Review Committee, member of an ad hoc committee charged with administering an Executive Committee election, and member of the Shareholder Evaluation Committee. Plaintiff downplays her roles on these sub-committees, and dismisses them as merely administrative, but the record indicates that

these were substantive and important positions within DMC, and not merely administrative. For example, the Associates and Class B Shareholders surely did not consider the Chair of the Associate Review Committee or a member of the Shareholder Review Committee to be "merely administrative." Additionally, the Court finds it revealing that previously she has described herself as the only "female in management," and otherwise as being in management at DMC.

Perhaps most important, plaintiff was eligible to be elected to the Executive Committee by her fellow Class A Shareholder/Directors, and, as a member of the Board of Directors, she had the ultimate authority under the By-Laws, even though she did not frequently exercise that authority. And, in fact, plaintiff did influence significant decisions of the Board of Directors.

Plaintiff voiced her opinion opposing the election of a female Class B Shareholder to Class A, against the recommendations of the Executive Committee, and her opinion prevailed. DMC offers numerous other examples of non Executive Committee Shareholders making recommendations, and serving on sub-committees proposing policy and practices that the Executive Committee did not agree with. Plaintiff participated in 42 annual and other Board of Directors meetings, wherein policy and business was discussed and decided, and she had the ability to attend all meetings of the Board of Directors, read the minutes, and make amendments to By-Laws.

The fact that plaintiff and most of the Shareholders generally deferred to the recommendations of the Executive Committee does not demonstrate that Executive Committee Shareholders are employers and non Executive Committee Class A Shareholder/Directors are employees. At most, this reflects the economic and political realities of the practice of law and divisions of labor at a large law firm.

Traditionally, partnerships-law firms are not democracies, and often are dominated by one or a few "autocratic" partners, but this reality does not render every other partner in the firm an employee even though he or she retains most of the indicia of ownership and control. The Court finds the partnership cases applying an economic realities test to determine if partners are employees to be most helpful, as the economic realities test takes into account myriad facts and circumstances similar to those considered under *Clackamas*. See *Ziegler v. Anesthesia Assocs. Of Lancaster, Ltd.*, 74 Fed. Appx. at 200-01 (district court's application of economic realities test to determine shareholder-physicians were employers affirmed as analysis "closely tracked" the *Clackamas* analysis). In this regard, see e.g., *Solon v. Kaplan*, 398 F.3d 629, 633 (7th Cir. 2005) (law partner of four partner firm was not "employee" entitled to sue for retaliation under Title VII, despite his argument that he had been cut out of any real decision making by the other three partners acting behind his back and that the partnership agreement was illusory); *Schmidt v. Ottawa Medical Center, P.C.*, 322 F.3d 461

(7th Cir. 2003) (physician who was shareholder-director in medical center operating as closely held professional corporation was a bona-fide partner-employer, and thus he was not defendant's "employee" under ADEA); *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood,* 315 F.3d 696, 702 (7th Cir. 2002) (in ADEA case, "it can be argued that partners should be classified as employers rather than employees for purposes of the age discrimination law because partnership law gives them effective remedies against oppression by their fellow partners . . . "); *Serapion v. Martinez,* 119 F.3d 982 (1st Cir. 1997) ("we conclude that while Title VII's employment-related shelter might in certain circumstances extend to a person who is a partner in a law firm, plaintiff . . . , a partner in [a] now-disbanded law firm . . . , is not entitled to such shelter here" after consideration of the economic realities of the partnership); *Auld v. Law Offices of Cooper, Beckman & Tuerk,* 981 F.2d 1250 (4th Cir. 1992) ("traditional partners are not 'employees' of the firm as an independent entity for the purposes of Title VII. Furthermore, several other Circuit Courts have held that partners and their equivalent are not Title VII employees.") (collecting cases); *Fountain v. Metcalf, Zima & Co., P.A.,* 925 F.2d 1398 (11th Cir. 1991) (economic reality was that plaintiff was akin to a partner in the accounting firm; analogizing accountants in professional corporation to partners in partnership, Court of Appeals rejected assertion that the "autocratic" actions of the firm's president constituted a reasonable basis for concluding that the plaintiff

was an employee, stating "[d]omination by an 'autocratic' partner over others is not uncommon and does not support a finding that the others are 'employees.'") (quoting *Wheeler v. Hurdman,* 825 F.2d 257, 273-74 (10th Cir. 1987)); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) (en banc) (shareholders in law firm organized as a professional corporation not employees because they function as partners).

The Class A Shareholder/Directors at DMC are equity owners, and have much independence, as do partners at a traditional partnership structured law firm. Members of the Executive Committee hold more operational authority and power delegated under the By-Laws and in practice, as at traditional partnership structured law firms. That one or a few attorneys have much greater power and influence within a law firm at any given time does not make the other attorneys in the firm, whether partners or shareholders, "employees." Plaintiff's position as Class A Shareholder/Director is quite similar to that of equity partners of partnership law firms, who are generally found to be employers. (The Court notes that plaintiff has offered no authority wherein an equity partner or a shareholder of a professional corporation practicing law was deemed to be an employee of the partnership or corporation.)

The Court finds that plaintiff has substantial influence over the professional corporation, much more so than Class B Shareholders and associate attorneys, although certainly less than members of

the Executive Committee. This factor also favors a finding that plaintiff is an employer, not an employee.

F. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

Labels and titles used in agreements, tax records and other documents are not strong indicators of whether a person is an employee or employer under *Clackamas*. Many of the examples plaintiff uses of "employment" and "employee" in various documents are equally applicable when used in reference to members of the Executive Committee, who, as plaintiff argues, are no doubt "employers" under *Clackamas*.

The intent of DMC with regard to employees and employers is derived more from the other *Clackamas* factors and the economic realities at the professional corporation, rather than from titles and labels used in written documents, as well as from By-Laws which set up the organizational structure of the corporation. Pursuant to Section 3.08(g) of the DMC By-Laws, plaintiff and all other Class A Shareholder/Directors receive a comprehensive package of benefits that associate attorneys/employees and other employees of the Firm are not entitled to and do not receive, and plaintiff has availed herself of these rights and benefits.

It is the totality of all documents, including the By-Laws, and the conduct of DMC vis a vis its

Shareholders, associates and other employees that determine the intent of both plaintiff and DMC that Class A Shareholder/Directors are owners of the Firm, not employees, and not merely employed by it.

G. Whether the individual shares in the profits, losses, and liabilities of the organization

Fringe Benefits

As noted, plaintiff was entitled to the maximum fringe benefits pursuant to the By-Laws, including choosing to attend non DMC sponsored continuing legal education seminars, at DMC expense. Class B Shareholders and associate attorneys did not have the option of choosing any CLE seminar to attend, or for full reimbursement by the Firm. Plaintiff traveled to Rome, Italy, in June of 2006 for a continuing legal education seminar sponsored by Duquesne University Law School; DMC paid the cost of this trip, totaling $4,410.26 for seminar registration, airfare and the $2,000 trip spending allowance.[22]

In fact, plaintiff accepted all of the Class A Shareholder/Director benefits package set forth in the By-Laws. Only Class A Shareholder/Directors received all of these benefits, although a couple of office administrators and the Firm Controller received

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[22] Plaintiff does not deny the historical facts regarding the trip to Rome and reimbursement by DMC, but she denies that it was "pursuant to the By-Laws."

parking and/or car allowance. Ms. Kirleis's acceptance of compensation and a comprehensive package of benefits pursuant to the By-Laws certainly weakens her argument that she is not bound by the By-Laws, even if, as she asserts, she never saw them.

Compensation

Plaintiff argues that the annual compensation paid to her and the other Shareholders of DMC is not based on ownership interest in DMC, which is supposedly in equal shares, but rather is "a salary that is determined in secret by the Executive Committee using the same criteria it uses to determine the compensation paid to associate attorneys who DMC admits are employees of the firm." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 142) at 25. Because the Executive Committee sets the compensation without input from the whole Board of Directors, and because the percentages are not equal amongst Shareholders, plaintiff argues she cannot be considered to share in the profits and losses of the corporation.

It is not disputed that each year in January, the Executive Committee projects the amount of profit it projects will be available for Shareholder compensation. DMC defines profit (or net profit or net distributable revenue) "as the amount of money left after DMC pays all expenses of the firm except shareholder salaries." *Id.* at 26. The Executive Committee then determines each Shareholder's projected compensation

for the year in terms of a dollar figure, and "allocates an alleged percentage of ownership of the firm to each shareholder by backing out each shareholder's projected compensation from the total projected amount of money available for distribution, which is supposed to represent the shareholder's ownership or equity interest in the firm." *Id.* Additionally, Kirleis asserts, she does not participate in any "true profits" of DMC because the Executive Committee can and does manipulate the costs to the Firm by awarding bonuses and raising salaries at will and without notice to or input from Kirleis or other shareholders of DMC. *Id.* at 26-27.

On the other hand, DMC offers record evidence, the substance and historical accuracy of which plaintiff does not dispute, of the following facts. Pursuant to Section 4.03(h) of the By-Laws, plaintiff's compensation, like that of all other Class A Shareholder/Directors, is set in January of each year for that calendar year by the Executive Committee, on which plaintiff is eligible to serve upon election or appointment. Compensation of all Class A Shareholder/Directors is set as a percentage of the Firm's profit, considering a number of factors utilizing a "whole lawyer" approach for individual Shareholder compensation.

The Shareholders are advised in writing what their estimated distribution in dollars will be if DMC makes exactly 100% of its projected net distributable profit, which is, as plaintiff states, annual revenue less all costs, including salaries and benefits of all

associate attorneys and other employees. Shareholder/Directors divide the net profits based on their allocated percentage share as set each January, and as a result, a Shareholder's final annual compensation may be more or less than the estimated distribution made the preceding January. Defendant's Concise Statement of Undisputed Material Facts (Doc. No. 132), at ¶¶ 123-126.

Citing numerous examples, the substance and historical accuracy of which plaintiff does not dispute, DMC demonstrates the following facts relating to annual compensation. When DMC's net distributable profits exceed estimated net distributable profits, plaintiff earns more than was projected at the beginning of the year, which is called a bonus; when its net distributable profits fall short of the estimated net distributable profits, plaintiff earns less than was projected at the beginning of that year; plaintiff and all other Shareholder/Directors have seen declines in their compensation in years that DMC's net distributable profit has been less than was available the prior year. *Id.* at ¶¶ 127, 129, 131. However, in years in which the firm's profits were less than or more than anticipated at the beginning of the year, the compensation paid to associates and other staff workers at DMC does not fluctuate. *Id.* at ¶¶ 128, 130.

In other words, when DMC's profits go up, Shareholders' compensation, but not associate attorneys' and staff workers' compensation, goes up; when DMC's profits go down, Shareholders' compensation,

but not associate attorneys' and staff workers' compensation, goes down. There is no legitimate dispute that the compensation paid plaintiff and the other Class A Shareholder/Directors reflects the Firm's profits, and is, therefore, a prime indicator of ownership under *Clackamas.*

Plaintiff offers no authority for her argument that her compensation does not reflect "true profit" because the Shareholders receive unequal shares, or that the pool of money distributed at year's end is not "true profit" because the Executive Committee may cause the pool of money to increase or decrease by manipulating costs, such as by awarding bonuses and adjusting salaries at will. Just as one would not expect all equity partners at a large partnership law firm to receive equal shares of the profits, so too for equity shareholders of a professional corporation. Unequal distribution of the profits does not make compensation based on a percentage of that profit any less dependent upon profit, nor does the fact that an Executive Committee may reduce a law firms' profits by increasing costs. Compensation remains a product of percentage of profits. See *Hishon,* 467 U.S. at 80, n. 3 (Powell, J., concurring) ("Divisions of partnership profits, unlike shareholders' rights to dividends, involve judgments as to each partner's contribution to the reputation and success of the firm. This is true whether the partner's participation in profits is measured in terms of points or percentages, combinations of salaries and points, salaries and bonuses, and possibly in other ways.").

Liabilities

Every Shareholder at DMC makes a $7,500 capital contribution toward liability. Associate attorneys and other staff employees do not make capital contributions. Plaintiff suggests this is a nominal amount in comparison with DMC's annual revenues and potential liability exposure, and speculates that the nominal amount is intended to give the illusion of ownership. The Court finds that this capital contribution, and plaintiff's exposure to DMC's potential liabilities, is not insignificant. The capital contribution of 61 to 69 Class A Shareholder/Directors is in the neighborhood of $500,000.00, not an enormous liability fund but not exactly worthless.

As DMC asserts, using this litigation as an example, if DMC was exposed to liability beyond that amount, there are various ways it could generate funds for payment. (Plaintiff is "without knowledge" and so denies DMC's assertions about the ways in which it might fund a judgment, but she does not counter DMC's assertions with any facts of record.) DMC could pay the judgment out of its current revenues, which payment would diminish the net profits available for distribution to all Shareholders, including plaintiff; DMC could borrow money to satisfy the judgment, and then that money would have to be repaid with interest, which would diminish the net profits available for distribution to all Shareholders, including plaintiff; or DMC could issue a capital call to its Shareholders pursuant to the By-Laws to

satisfy a judgment, which would require all Shareholders, including plaintiff, to increase their amount of capital in the Firm.

Liability will be borne by the Class A Shareholder/Directors of the Firm which, in one way or another, will affect the Firm's profits or losses.

The sixth *Clackamas* factor, the monetary factor, weighs heavily in favor of DMC.

V. Conclusion

As Justice Powell stated in the *Hishon* case, which held that Title VII precluded a law firm from denying partnership consideration to an associate on the basis of her gender, the Court's opinion "should not be read as extending Title VII to the management of a law firm by its partners." *Hishon v. King & Spalding,* 467 U.S. 69, 79-80 (1984) (Powell, J., concurring). Justice Powell continued as follows:

> The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee – including that between the partnership and its associates. The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law partnership

> is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement, . . . or consent among the partners.

Id. (footnotes omitted).

Since *Hishon,* "several appellate courts have followed Justice Powell's lead and declared, with varying nuances, that partners are not protected as employees under federal anti-discrimination laws." *Serapion,* 119 F.3d at 986 (citing *Simpson v. Ernst & Young,* 100 F.3d 436, 443 (6th Cir. 1996), *cert. denied,* 520 U.S. 1248 (1997) and *Wheeler v. Hurdman,* 825 F.2d 257, 263 (10th Cir. 1987)).

While under the *Clackamas* case, a partner in a legal partnership should not automatically be deemed an employer, the indicia of control and ownership in traditional large firm partnerships tilts toward recognizing equity partners as employers and not employees, although all factors must be considered. Ms. Kirleis shares many of the attributes of traditional equity partners in a large law firm partnership. She owns DMC as much as any other Class A Shareholder/Director owns it, including members of the Executive Committee and its officers, and she shares in its profits, losses and liabilities, unlike those employees and associate attorneys whose salaries are is [sic] fixed. Moreover, the comprehensive and generous fringe benefit package that plaintiff accepts is obviously an emollient of ownership

that Class B Shareholders, associate attorneys and other employees of the Firm do not receive.

Additionally, plaintiff participates meaningfully in Board of Directors meetings, decisions, policy and business of the Firm, although members of the Executive Committee have greater participation by virtue of the delegation given to them by plaintiff and the 3/4 majority of the Board of Directors. Plaintiff could, if she garnered enough support, be elected to the Executive Committee herself, and she could amend the By-Laws.

The factors relevant to ownership and remuneration provide powerful indications that the appellant should not be treated as an employee for Title VII, PHRA and FLSA purposes. On management and control issues, the determination is not as heavily weighted toward a finding of "employer" status, but, nevertheless, still strongly favors the finding that plaintiff is not an "employee" of the professional corporation.

Under all of the circumstances of this case and the *Clackamas* test, the Court finds that Ms. Kirleis is an "employer" as that term has been defined by the courts under the anti-discrimination laws. Accordingly, summary judgment must be granted in favor of DMC.

An appropriate Order will be entered.

SO ORDERED this 28th day of October, 2009.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: all counsel of record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

ALYSON J. KIRLEIS,

Plaintiff,

v.

DICKIE, MCCAMEY & CHILCOTE, P.C.,

Defendant.

06cv 1495
Electronically Filed

ORDER OF COURT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. NO. 130)

(Filed Dec. 9, 2009)

AND NOW, this 28th day of October, 2009, for the reasons stated in the Memorandum Opinion filed this day, Defendant's Motion for Summary Judgment (Doc. No, 130) is HEREBY GRANTED and summary judgment will be entered in favor of defendant.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: all counsel of record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4498

ALYSON J. KIRLEIS,

Appellants.

v.

DICKIE, MCCAMEY & CHILCOTE. P. C.

Before: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, VANASKIE, GREENAWAY, JR., ROTH* and ALDISERT*, Circuit Judges

ORDER

(Filed Aug. 10, 2010)

The petition for panel rehearing and rehearing *en banc* filed by the Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

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* Judge Roth's vote and Judge Aldisert's vote are limited to panel rehearing only.

not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: August 10, 2010

cc: Edward B. Friedman, Esq.
Gloria A. Aiello, Esq.
Sunshine R. Fellowos, Esq.
Donna J. Geary, Esq.
Martin J. Saunders, Esq.
Susan J. Frietsche, Esq.

PITTSBURGH
TRIBUNE-REVIEW

Judge dismisses lawyer's discrimination case against firm

By Brian Bowling
TRIBUNE-REVIEW
Tuesday, November 3, 2009

A federal judge ruled that a lawyer who sued her firm for sexual discrimination is not protected by anti-discrimination laws because as a shareholder she is an employer, and not an employee.

Alyson J. Kirleis, 46, of Upper St. Clair sued Dickie McCamey & Chilcote in 2006, claiming a pattern of discrimination.

She said she got less pay for the same work as her male counterparts, and was excluded from the office Christmas party and other functions because the entertainment includes sexually explicit or pornographic materials and is followed by outings to strip clubs.

A senior member of the firm also told her she needed to spend less time at work and more time with her family, the lawsuit stated.

Kirleis has worked at the firm since 1988, when she received her law degree from the University of Pittsburgh. The firm's main client is the University of Pittsburgh Medical Center.

U.S. District Judge Arthur Schwab said in his ruling that while a smaller executive committee has more power, Kirleis is a voting member of the firm's board and therefore helps manage its operation.

Kirleis argued that the board does little more than "rubber stamp" decisions by the executive committee and the executive committee controls which lawyers are assigned to cases and how much they get paid.

Edward Friedman, Kirleis' lawyer, said they will appeal Schwab's ruling but declined to further discuss the case. The attorney representing the law firm couldn't be reached for comment.

Brian Bowling can be reached at bbowling@tribweb.com or 412-325-4301.

Judge nixes Pa. atty's bias suit as 'employer'
Tuesday, November 03 2009

[LOGO] **Associated Press**

PITTSBURGH (AP) – November 3, 2009 – A federal judge has dismissed a sex discrimination suit a female attorney filed against a Pittsburgh law firm saying because she is a shareholder the attorney is, essentially, her own employer.

The lawyer for 46-year-old Alyson Kirleis, of Upper St. Clair, says he'll appeal Tuesday's ruling by U.S. District Judge Arthur Schwab.

Kirleis sued Dickie McCamey & Chilcote in 2006 claiming she got less pay than male colleagues and was excluded from office parties because they often include sexually explicit entertainment.

But Schwab says because Kirleis is a member of her firm's board, she is an employer, not an employee.

Kirleis has claimed the board she serves on merely "rubber stamps" decisions made by the firm's executive board, which she claims controls the firm's policies.

Information from: Pittsburgh Tribune-Review, http://pghtrib.com

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Labor & Employment

Law Firm Partner Loses Lawsuit Over Pay & Alleged Strip Club Outings

Posted Nov 3, 2009 2:45 PM CDT
By *Martha Neil*

A federal judge has dismissed a suit filed by a female partner of a Pennsylvania law firm over alleged pay discrimination and sexually explicit work-related activities.

U.S. District Judge Arthur Schwab ruled that plaintiff Alyson Kirleis, a 46-year-old partner of Dickie McCamey & Chilcote, can't continue with her 2006 action against the Pittsburgh firm because, as a partner, she is an employer rather than an employee covered by anti-discrimination laws, reports the *Pittsburgh Tribune-Review*.

Kirleis' lawyer says she plans to appeal the dismissal. Although he declines to discuss any potential appellate arguments, Kirleis argued in U.S. District Court that the firm's board, of which she is a voting member, is essentially a "rubber stamp" for the executive committee, which controls attorney pay and work assignments.

Kirleis also contended in the suit that she was excluded from firm functions including its Christmas party because the events allegedly include sexually explicit entertainment and are followed by strip club outings.

A lawyer for the firm couldn't be reached by the newspaper for comment.

Kirleis has worked at the firm since earning her law degree from the University of Pittsburgh in 1988.

Additional and related coverage:

Associated Press: "Judge nixes Pa. atty's bias suit as 'employer'"

ABAJournal.com: "Partner Won't Have to Arbitrate Bias Claim against Law Firm, 3rd Circuit Rules"

Pittsburgh Tribune-Review (2006): "Lawyer sues her Downtown firm"

ABA Journal (2005): "Who is a Partner?"

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LAW 360

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Law Firm Shareholder Can't Sue For Sex Bias: Judge

By **Erin Fuchs**

Law360, New York (November 04, 2009) – A federal judge has nixed a female shareholder's sex bias suit against Dickie McCamey & Chilcote PC, finding that she isn't an employee entitled to protection under anti-discrimination laws.

Judge Arthur J. Schwab of the U.S. District Court for the Western District of Pennsylvania granted summary judgment to Pittsburgh-based Dickie McCamey on Oct. 28, ruling that shareholder Alyson Kirleis is an employer rather than an employee and thus can't sue the firm for sexual discrimination.

The judge's decision relied on the standards set out in the 2003 U.S. Supreme Court ruling in Clackamas Gastroenterology Associates PC v. Wells, which weighed in on the question of what constitutes an employee or employer.

According to Judge Schwab, Clackamas laid out a number of factors courts should use to determine employee status, including whether one can be fired, one's work is supervised, one can influence the organization or one shares in profits.

Kirleis argued that she was not an employer because as a Class A shareholder she was still beholden to Dickie McCamey's executive committee, which sets pay for all staff and lawyers, assigns cases, and hires and fires lawyers.

But Judge Schwab sided with Dickie McCamey, in large part because the board of directors – which includes shareholders such as Kirleis – hires and fires individual shareholders at the firm.

According to Kirleis, though, the executive committee effectively does the hiring and firing because it assigns work to shareholders and has the power to reduce their workload and therefore their pay.

"With repeated reductions in compensation or the threat of reduction in compensation, the attorney becomes frustrated and leaves the firm giving the members of the executive committee what they wanted; i.e. the termination of the attorney's employment with DMC," the plaintiff said in a motion opposing summary judgment.

The firm's bylaws also stipulate that officers', directors' and shareholders' compensation is confidential and that the executive committee has the exclusive right to allocate compensation, Kirleis argued.

"Although it is an important subject," Judge Schwab acknowledged in his Oct. 28 decision, "that fact that this one area of DMC financial decisions is delegated exclusively to the executive committee does not mean

that everyone else affected by this delegation of authority and confidentiality is an employee."

Kirleis is an employer in part because she has ultimate control over her work environment, Judge Schwab found.

As a voting Class A shareholder/director, he said, she can amend the firm's bylaws, supervises other lawyers and staff, and has the authority to influence Dickie McCamey's decisions.

The judge also shot down her argument that the firm's bylaws were a "sham" and that the executive committee had the real power in the firm.

"Traditionally partnerships-law firms are not democracies, and often are dominated by one or a few 'autocratic' partners, but this reality does not render every other partner in the firm an employee," the opinion said.

Kirleis sued the firm in November 2006, alleging sex discrimination, retaliation and a hostile environment. The allegations included a claim that another shareholder who helped determine her compensation informed her that she didn't spend enough time with her children, and that she should give up her shareholder status to do so.

She also claimed that another shareholder informed her that the "gals" in the office would prepare the cases, which the male lawyers would then take to trial.

Kirleis, still a shareholder at the firm, intends to appeal the decision, her lawyer said, declining to comment further.

The firm, for its part, said it was pleased with the court's decision.

"Dickie McCamey has always known that it has not discriminated, and does not discriminate, against any person, on any basis," the firm said in a statement.

Edward B. Friedman of the Law Offices of Friedman & Friedman represents Kirleis.

Jackson Lewis LLP represents Dickie McCamey.

The case is Alyson J. Kirleis v. Dickie McCamey & Chilcote PC, case number 2:06-cv-01495, in the U.S. District Court for the Western District of Pennsylvania.

– Additional reporting by Ben James

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Law Firms

3rd Circuit to Decide Whether Law Firm Partner Can Sue for Equal Pay

Posted May 4, 2010 8:59 AM CDT
By *Debra Cassens Weiss*

A federal appeals court is being asked to decide whether a law firm partner can sue for alleged pay discrimination.

Lawyer Alyson Kirleis alleges Pittsburgh law firm Dickie McCamey & Chilcote pays women lawyers less than male lawyers, the *Legal Intelligencer* reports. Her suit also claims male partners told her that women with children should give up partnership and work part-time, and that the role of women lawyers was to prepare lawsuits for trials to be handled by male lawyers.

Kirleis also contended in the suit that she was excluded from firm functions including its Christmas party because the events allegedly include sexually explicit entertainment and are followed by strip club outings.

A federal judge had ruled in October 2009 that Kirleis could not sue because she is a shareholder who shares in profits and losses rather than an employee eligible to sue under discrimination laws. On appeal, Kirleis' lawyers argue their client is an employee subject to the employment decisions of the firm's

executive committee. The case is pending before the Philadelphia-based 3rd U.S. Circuit Court of Appeals.

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THE AM LAW DAILY

May 4, 2010 5:14 PM

Are Some Partners Employees? And Can They Sue as Such?

Posted by Zach Lowe

This one could be a doozy: A female partner at Pittsburgh firm Dickie McCamey & Chilcote has asked a federal appeals court for permission to sue the firm for violating various employment laws, including allegedly paying women less than men, according to Am Law Daily sibling publication The Legal Intelligencer.

Wait, you say. *She's a partner, not an employee! She can't sue for sex discrimination as an employee!*

But the partner-plaintiff in question, Alyson Kirleis, claims she can in fact sue, and she has asked the U.S. Court of Appeals for the Third Circuit to revive her case against Dickie McCamey, the Intelligencer reports. The court would have to overturn a lower court ruling that dismissed Kirleis' suit on the grounds that, as a partner, she does not qualify as an employee with the right to file claims as such.

Kirleis's argument to the Third Circuit? She qualifies as an employee because partners above her on the food chain – particularly those who sit on various management committees – control her compensation, employment status, and other conditions of her job, the Intelligencer reports. Kirleis and her legal team claim that being subject to that sort of control marks

her as an employee, the Intelligencer says. Dickie McCamey and its legal team at Jackson Lewis disagree and say precedent bars Kirleis's suit, the Intelligencer reports.

Several high-profile groups, including the Women's Law Project and the National Women's Law Center, are backing Kirleis as amici in the case.

The underlying claims in Kirleis's would-be action are ugly. She accuses Dickie McCamey of pay discrimination and says that a male partner told her that a woman with children should give up her partnership, the Intelligencer reports. She also claims a second male partner says female lawyers serve to prepare lawsuits for male partners who then handle those suits at trial. Kirleis also alleges that the firm's Christmas party includes sexually explicit skits, songs, and pornographic materials, the Intelligencer reports.

Does she have a chance at the Third Circuit? Well, that court previously ruled against Dickie McCamey when the firm argued that Kirleis could only pursue her claims via arbitration and not in federal court. That ruling alone was considered precedent-setting.

We have a feeling firms will be watching this case closely.

theamlawdaily@alm.com

The Legal Intelligencer

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Groundbreaking Discrimination Suit Could Open Door to Equal Pay for Women Partners

Shannon P. Duffy
05-05-2010

PHILADELPHIA – A Pittsburgh law firm is poised to square off in a federal appeals court against one of its own partners in a potentially ground-breaking sex discrimination suit that could open the door to women lawyers suing for equal pay – even after they have been named partners.

Attorney Alyson J. Kirleis' suit against Dickie McCamey & Chilcote already set a legal precedent when the 3rd U.S. Circuit Court of Appeals held that she could not be forced to arbitrate her claims, rejecting the firm's argument that its bylaws mandate arbitration.

But when the case was remanded, it was assigned to a new judge, U.S. District Judge Arthur J. Schwab of the Western District of Pennsylvania, who granted summary judgment in favor of the firm on the grounds that Kirleis – as a shareholder and member of the firm's board of directors – cannot be considered an "employee" of the firm.

Now, in a second appeal, Kirleis is asking the 3rd Circuit to revive her case, arguing that despite her titles of shareholder and director, she should be treated

as an employee because her work is "subject to the control of" the firm's 13-member executive committee.

Supporting Kirleis is an amicus brief from the Women's Law Project in Philadelphia, the National Women's Law Center and the National Partnership for Women & Families, which says Schwab's decision "relied on a mistaken view of how law firms currently function and misapplied the appropriate legal standard, denying Kirleis a day in court."

In the suit, Kirleis accuses Dickie McCamey of paying female lawyers less than males and claims she has been told by a male partner that a woman with children should relinquish her partnership and work only part-time.

Kirleis, 46, who has worked at the firm since 1988, also claims she was told by another male partner that the role of women lawyers was to prepare lawsuits for trials that would be handled by male lawyers.

The suit also includes allegations that Kirleis has suffered retaliation since her suit was filed, and that Dickie McCamey's annual Christmas party is effectively closed to women "because of the sexually explicit nature of the entertainment including skits, songs, pornographic materials and props."

In an October 2009 decision that dismissed the suit, Schwab concluded that Kirleis is barred from suing because of her status.

Schwab said he recognized that a partner in a law firm "should not automatically be deemed an employer" under the U.S. Supreme Court's 2003 decision in *Clackamas Gastroenterology Associates v. Wells.*

In *Clackamas,* the justices said that the "touchstone" of the inquiry into whether a worker may sue as an employee is "control," and instructed lower courts to consider several factors to determine whether an organization exercises control over the plaintiff, such as hiring and firing, supervision, hierarchy, liability and influence.

But Schwab found that applying the Clackamas test to Dickie McCamey showed that the Class A partners at the firm cannot be treated as employees.

"The indicia of control and ownership in traditional large firm partnerships tilts toward recognizing equity partners as employers and not employees, although all factors must be considered," Schwab wrote.

Kirleis, he said, "shares many of the attributes of traditional equity partners in a large law firm partnership. She owns DMC as much as any other Class A shareholder/director owns it, including members of the executive committee and its officers, and she shares in its profits, losses and liabilities, unlike those employees and associate attorneys whose salaries are fixed."

Schwab found that the factors relevant to ownership and remuneration provide "powerful indications that

[Kirleis] should not be treated as an employee" for purposes of Title VII and the Pennsylvania Human Relations Act.

On management and control issues, Schwab said, "the determination is not as heavily weighted toward a finding of 'employer' status, but, nevertheless, still strongly favors the finding that plaintiff is not an 'employee' of the [firm]."

On appeal, Kirleis' lawyers, Edward B. Friedman and Gloria A. Aiello of Friedman & Friedman in Pittsburgh, argue that Schwab misapplied the Clackamas test and that his ruling reveals that he improperly applied the so-called "economic realities" test that was explicitly rejected by the Clackamas court.

Friedman and Aiello also argue that Schwab erred by relying on the wording of Dickie McCamey's bylaws without examining the evidence of how the firm truly operates.

Kirleis, they said, presented compelling evidence that the firm's executive committee exercises control over Kirleis' work and can fire Kirleis and any other partner.

In the amicus brief, attorney Susan Frietsche of the Women's Law Project argues that Schwab's ruling effectively immunized law firms by relying on pre-*Clackamas* case law, most notably Justice Lewis Powell's concurring opinion in the 1984 decision in *Hishon v. King & Spalding*.

Schwab noted in his 51-page opinion that several appellate courts have followed Powell's lead in Hishon and declared, with varying nuances, that law firm partners are not protected as employees under federal anti-discrimination laws.

But Frietsche argued that Powell's views, as expressed in Hishon, are outdated.

As Powell explained his understanding of law firm management in the mid-1980s, Frietsche said, "the relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement . . . or consent among the partners."

But in the quarter century since that ruling, Frietsche said, "the practice and the business of law have changed," and law firms "have adopted entirely new methods of operating, including multi-tiered partnerships, increasingly large partnerships that confer limited rights, and executive committees that exercise full control over the hiring, firing, promotion, and compensation of the attorneys in the firm."

The Clackamas decision, Frietsche said, "reflects this reality," and was intended "to distinguish traditional partnerships from more modern business associations in which many individuals are only nominally partners."

But Dickie McCamey's lawyers – Martin J. Saunders and Sunshine R. Fellows of Jackson Lewis in Pittsburgh – argue in the appellate brief that Schwab's

analysis was correct and that Kirleis clearly must be barred from suing under Clackamas.

"The rights of and benefits conferred upon Kirleis as a Class A shareholder/director of DMC under its bylaws and her continuous acceptance and use of those rights and benefits," they argue, are sufficient evidence to show that Kirleis "not only is an owner of DMC but also is an employer."

"A finding to the contrary would be tantamount to holding that all Class A shareholder/directors at DMC, which includes its president and members of the executive committee, are employees regardless of the extent of their influence and ownership or the correlation between their remuneration," Saunders and Fellows wrote.

Saunders could not be reached for comment on the appeal. Dickie McCamey CEO James R. Miller also did not return calls seeking comment on Kirleis' allegations

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Texas Employment Law Blog

Equal pay for women law firm partners?

Posted May 5, 2010 by michellemacleod

Women law firm partners are often not considered by courts to be employees in their firms, and thus not protected by discrimination laws, despite the fact that they are usually controlled and subject to dismissal by the firms' executive committees.

Alyson J. Kirleis, a partner at Pittsburgh firm Dickie McCamey & Chilcote, is arguing before the Third Circuit that because she is subject to the control of the firm's 13 member executive committee, she is an employee and entitled to equal pay. Kirleis previously made the news by successfully arguing in the Third Circuit that she could not be forced to arbitrate her claims under the firms' bylaws, in part because she was not aware of the bylaws. See that decision here.

Kirleis argues in the suit that the firm not only pays female partners less than male partners but also subjects them to sexist comments so as to constitute a hostile work environment. She states that a male partner suggested to her that women with children should relinquish partnership and work part-time, while another male partner told her that the role of women lawyers was to prepare lawsuits for trials to be handled by male lawyers.

Under a 2003 Supreme Court case, *Clackamas Gastroenterology Associates v. Wells,* 538 U.S. 440 (2003),

courts are to determine whether a worker is an employee by evaluating the extent to which the worker is "controlled" by the organization. The factors include the organization's ability to hire and fire the worker, supervision, hierarchy, liability, and influence. The Court in *Clackamas* remanded for a determination whether four physician-shareholders should be counted as employees for purposes of subjecting the organization to the Americans with Disabilities Act, which applies only to organizations with 15 or more employees.

U.S. District Judge Arthur J. Schwab of the Western District of Pennsylvania held in the lower court decision that because Kirleis shared in the profits, losses, and liabilities of the law firm she was not an employee and therefore not protected by Title VII and the Pennsylvania Human Relations Act. Kirleis' lawyer argues that Schwab's decision shows that he improperly applied the "economic realities" test explicitly rejected by *Clackamas* and that despite claiming that he considered all the factors, Schwab only considered pay issues when he determined that Kirleis was not an employee of the firm.

A number of women's rights groups have supported Kirleis in amicus briefing, including the Women's Law Project in Philadelphia, the National Women's Law Center, and the National Partnership for Women & Families. See the brief here. These groups argue that Schwab's decision that Kirleis was an employee relied on a mistaken view of how law firms actually operate and did not apply the appropriate legal

standard. Susan Frietsche of the Women's Law Project argues that Schwab's ruling inappropriately relied on pre-*Clackamas* case law, primarily on Justice Powell's concurring opinion in *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

Interestingly, the actual decision in *Hishon* holds that a female associate denied partnership was protected by Title VII even if a partnership invitation is not itself an offer of employment because it entails a change in status from an "employee" to an "employer." Read the opinion here. Powell's concurrence argues that to the extent King & Spalding voluntarily assumed the obligation to promote associates to partnership on a fair and equal basis, it had an obligation to do so, but that law firms should not be subject to Title VII because the relationship among law partners differs markedly from that between employer and employee. Read the concurrence here. So while the actual decision held that Hishon was protected under both Title VII and by contract, Powell would hold Hishon was protected only by contract.

Schwab notes in his decision that several appellate courts have followed Powell's lead in *Hishon* and suggests that law firm partners are not protected as employees under federal anti-discrimination laws.

Frietsche argues that Powell's views in the *Hishon* concurrence are outdated: where Powell spoke of mutual consent of the partners, today's law firms are much larger and have multi-tiered partnerships and executive committees with full control over hiring,

firing, promotion, and compensation. Hence, many of today's law firm "partners" are really employees. Frietsche states that the *Clackamas* decision reflects the new reality that in modern business associations many individuals are only nominal partners.

[LOGO]

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Law Firm Shareholder Can't Sue For Sex Bias: 3rd Circ.

By **Leigh Kamping-Carder**

Law360, New York (July 15, 2010) – The U.S. Court of Appeals for the Third Circuit on Thursday upheld the dismissal of a female shareholder's sex bias suit against Dickie McCamey & Chilcote PC, finding that she isn't an employee entitled to protection under anti-discrimination laws.

In an unpublished opinion, the three-judge panel decided that shareholder Alyson J. Kirleis is an employer rather than an employee and thus cannot sue the firm for sexual discrimination, affirming a district court's grant of summary judgment in favor of Pittsburgh-based Dickie McCamey.

Like the district court, the Third Circuit relied on the six factors set out in the 2003 U.S. Supreme Court ruling in Clackamas Gastroenterology Associates PC v. Wells to determine whether a shareholder-director of a professional corporation is an employee or employer.

The Third Circuit noted that Kirleis, a Class A shareholder, cannot be fired for cause without a three-quarter majority vote of the board of directors and is entitled to a percentage of Dickie McCamey's profits.

"We cannot agree that Kirleis is a mere employee" of Dickie McCamey, the Third Circuit said, supporting the Oct. 28 ruling of Judge Arthur J. Schwab of the U.S. District Court for the Western District of Pennsylvania.

On appeal, Kirleis argued that although she is a shareholder, she merely "rubber stamp[s]" the decisions of the executive committee members, who have the real power to set billing rates, make compensation decisions and even force partners to resign.

Particularly, her work for the firm's largest client, the University of Pittsburgh Medical Center, is "closely supervised" and subject to specific guidelines, she claimed, according to the opinion.

"We're going to ask for a reconsideration. We don't believe that it's in accordance with the latest ruling by the Supreme Court," said Kirleis' attorney, Edward B. Friedman, referring to Clackamas. He declined to comment further.

Kirleis sued the firm in November 2006, alleging she received less pay than her male counterparts and was subject to a hostile work environment.

A shareholder who helped determine her compensation informed her that she didn't spend enough time with her children, and that she should give up her

shareholder status to do so, Kirleis claimed. Another shareholder informed her that the "gals" in the office would prepare the cases, which the male lawyers would then take to trial, she said.

Kirleis, whose practice focuses on medical malpractice defense and labor law, is still a shareholder at Dickie McCamey, according to the firm's website. She became a shareholder eight years ago, the opinion said.

A representative for Dickey McCamey did not immediately respond to a request for comment Thursday.

The question of whether law firm partners are employees or employers is a hotly contested one.

In January, the U.S. Equal Employment Opportunity Commission sued Kelley Drye & Warren LLP, claiming its mandatory retirement policy discriminated against older partners. The commission's senior trial attorney said the case would turn on how the U.S. District Court for the Southern District of New York interpreted Clackamas.

At the time, some attorneys speculated that the suit might in part be motivated by the EEOC's desire to secure a court ruling finding that partners are covered under anti-discrimination laws. Kelley Drye abolished the disputed retirement policy three weeks after the suit was filed.

Judges Julio M. Fuentes, Ruggero J. Aldisert and Jane R. Roth sat on the panel for the Third Circuit.

Kirleis is represented on appeal by the Law Offices of Friedman & Friedman.

Dickie McCamey is represented on appeal by Jackson Lewis LLP.

The case is Alyson J. Kirleis v. Dickie McCamey & Chilcote PC, case number 09-4498, in the U.S. Court of Appeals for the Third Circuit.

– Additional reporting by Erin Fuchs

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The Legal Intelligencer

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3rd Circuit Tosses Dickie McCamey Sex Bias Lawsuit

Shannon P. Duffy
07-20-2010

A woman lawyer cannot sue her firm for sex discrimination if her status as a shareholder and director gives her the ability to participate in firm governance and a percentage of firm profits, the 3rd U.S. Circuit Court of Appeals has ruled.

The ruling is a victory for Pittsburgh firm Dickie McCamey & Chilcote and means that attorney Alyson Kirleis' four-year court battle with the firm has ended with a fizzle as the appellate judges issued a tersely worded, four-page, nonprecedential opinion that adopted the lower court's reasons for dismissing the case on summary judgment.

"We cannot agree that Kirleis is a mere employee of DMC, and our review of the record supports the district court's conclusion in this regard," Senior U.S. Circuit Judge Jane R. Roth wrote.

Kirleis' remaining options have now dwindled to statistically unlikely ones – seeking a rehearing before all 14 judges on the 3rd Circuit or petitioning the U.S. Supreme Court to take up her case.

Her lawyer, Edward B. Friedman of Friedman & Friedman in Pittsburgh, declined to comment except to say that he does intend to seek rehearing before the full court.

"We're gratified by the 3rd Circuit's affirming of the judge's decision and pleased that the firm has been vindicated," said Jeffrey T. Wiley, the managing director and chief operating officer of Dickie McCamey.

Roth, who was joined by Judges Julio M. Fuentes and Ruggero J. Aldisert, noted that Kirleis, as a Class A shareholder at Dickie McCamey, has the right not to be terminated without a vote by a supermajority of the firm's board.

As a result, Roth concluded that Kirleis was unable to qualify as an employee under the multifactor test created by the U.S. Supreme Court to decide whether a worker should be deemed an employer or an employee.

And since only employees have the right to sue for sex discrimination, Roth found that U.S. District Judge Arthur J. Schwab of the Western District of Pennsylvania was right to dismiss the case.

Kirleis' latest appeal had the potential for breaking legal ground if she had succeeded in establishing that some law firm partners are not equal to their fellow partners and ought to be allowed to pursue employment discrimination claims such as suing for equal pay.

In her first appeal, Kirleis set a legal precedent when the 3rd Circuit held that she could not be forced to arbitrate her claims, rejecting the firm's argument that its bylaws mandate arbitration.

But when the case was remanded, Schwab granted summary judgment in favor of the firm on the grounds that Kirleis cannot be considered an "employee" of the firm.

In a second appeal, Kirleis was asking the 3rd Circuit to revive her case, arguing that despite her titles of shareholder and director, she should be treated as an employee because her work is "subject to the control of" the firm's 13-member executive committee.

Supporting Kirleis was an amicus brief from the Women's Law Project in Philadelphia, the National Women's Law Center and the National Partnership for Women and Families, that criticized Schwab's decision as one that "relied on a mistaken view of how law firms currently function and misapplied the appropriate legal standard, denying Kirleis a day in court."

In the suit, Kirleis accused Dickie McCamey of paying female lawyers less than males and alleged she was told by a male partner that a woman with children should relinquish her partnership and work only part-time.

Kirleis, who has worked at the firm since 1988, also claimed she was told by another male partner that the role of women lawyers was to prepare lawsuits for

trials that would be handled by male lawyers. The suit also included allegations that Kirleis has suffered retaliation since her suit was filed, and that Dickie McCamey's annual Christmas party is effectively closed to women "because of the sexually explicit nature of the entertainment including skits, songs, pornographic materials and props."

In an October 2009 decision that dismissed the suit, Schwab concluded that Kirleis is barred from suing because of her status.

Schwab said he recognized that a partner in a law firm "should not automatically be deemed an employer" under the U.S. Supreme Court's 2003 decision in *Clackamas Gastroenterology Associates v. Wells*.

In *Clackamas*, the justices said that the "touchstone" of the inquiry into whether a worker may sue as an employee is "control," and instructed lower courts to consider several factors to determine whether an organization exercises control over the plaintiff, such as hiring and firing, supervision, hierarchy, liability and influence.

But Schwab found that applying the *Clackamas* test to Dickie McCamey showed that the Class A partners at the firm cannot be treated as employees.

"The indicia of control and ownership in traditional large firm partnerships tilts toward recognizing equity partners as employers and not employees, although all factors must be considered," Schwab wrote.

Kirleis, he said, "shares many of the attributes of traditional equity partners in a large law firm partnership. She owns DMC as much as any other Class A shareholder/director owns it, including members of the executive committee and its officers, and she shares in its profits, losses and liabilities, unlike those employees and associate attorneys whose salaries are fixed."

On appeal, Kirleis argued that Schwab's analysis of the *Clackamas* test was flawed at every step, and that her status as a shareholder and director of the firm was merely a "rubber-stamp" function.

The appeal said Dickie McCamey's executive committee – and not its board – sets all hourly billable rates, makes compensation decisions, and sometimes forces shareholders to resign.

But the 3rd Circuit was unimpressed and concluded that Kirleis must be considered an employer "as a matter of law" because of her position on the board, her sharing in profits, and her status as someone who could be fired only if 75 percent of the board voted to do so.

Roth closed the short opinion with a ringing endorsement of Schwab's ruling, saying "for these and all of the other reasons set forth in the district court's thorough opinion, we find that Kirleis is an employer at DMC" who is therefore "precluded from bringing claims under the employment anti-discrimination laws."

Dickie McCamey's lawyers – Martin J. Saunders and Sunshine R. Fellows of Jackson Lewis in Pittsburgh – could not be reached for comment.

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THE AMLAW DAILY

July 20, 2010 11:34 AM

Potential Landmark Sex Discrimination Case Tossed Out

Posted by Zach Lowe

It had the potential to be a groundbreaking suit – a female equity partner at the Pittsburgh firm Dickie McCamey & Chilcote sued her own firm for sex discrimination even though she is not an employee and the right to file such suits typically disappears when a lawyer becomes an equity partner. The case could have opened the door to a whole new breed of employment discrimination cases, and it drew the backing of several high-profile groups that monitor the status of women in the legal profession.

But it was not to be. A federal appeals court tossed out Alyson Kirleis's case on Monday, claiming that her status as the equivalent of an equity partner disqualifies her from bringing a workplace sex discrimination claim, according to The Legal Intelligencer, one of our sibling publications. Kirleis (pictured above), who has been at Dickie McCamey since 1988, had argued that she should still be allowed to sue, since the firm's executive committee and other partners above her on the food chain control her compensation, employment status, and other job conditions, according to our prior reporting. She and her legal team argued that the issue of control is more important than Kirleis's status as an equity partner.

A three-judge panel of the U.S. Court of Appeals for the Third Circuit disagreed, concluding that Kirleis is a true firm shareholder and that, like other shareholders, she can only be terminated if a supermajority of the firm's board votes to do so, the Intelligencer says. Kirleis plans to ask for an en banc rehearing, but the odds are long, the Intelligencer reports.

Kirleis had claimed that Dickie McCamey paid female lawyers less, and that male lawyers had suggested female lawyers who have children should give up their partnership status. She also claimed that one male partner told her female lawyers should help prepare litigation but turn cases over to men to handle at trial. Kirleis also alleged that the firm's Christmas party included sexually explicit entertainment featuring pornographic materials, the Intelligencer reports.

The Women's Law Project, the National Women's Law Center and the National Partnership for Women and Families filed an amicus brief supporting Kirleis, the Intelligencer says.

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November 2006, Pittsburgh Tribune-Review
Contact Zach Lowe at zlowe@alm.com.

Partners

Law Firm Partner May Not Sue for Sex Discrimination, 3rd Circuit Rules

Posted Jul 20, 2010 7:22 AM CDT
By Debra Cassens Weiss

A federal appeals court has affirmed the dismissal of a sex discrimination suit filed by a partner in a Pennsylvania law firm, holding that she does not qualify as an employee who is covered by discrimination laws.

The court ruled against Alyson Kirleis, a shareholder and director with Pittsburgh law firm Dickie McCamey & Chilcote, the Legal Intelligencer reports. Kirleis had argued she should be considered an employee because she was subject to the control of the firm's executive committee.

"We cannot agree that Kirleis is a mere employee of DMC," the appeals court said in its nonprecedential ruling (PDF). "As a class A shareholder-director of DMC, Kirleis has the ability to participate in DMC's governance, the right not to be terminated without a three-fourths vote of the board of directors for cause, and the entitlement to a percentage of DMC's profits, losses and liabilities."

The decision means that "Kirleis' four-year court battle with the firm has ended with a fizzle," the Intelligencer says. Her lawyer, Edward Friedman, said he does not intend to seek an en banc rehearing.

Kirleis had alleged the firm paid female lawyers less than male lawyers. She also had claimed that male partners told her that women with children should give up partnership and work part-time, and that the role of women lawyers was to prepare lawsuits for trials to be handled by male lawyers.

Kirleis' appeal had been supported by an amicus brief from the Women's Law Project in Philadelphia, the National Women's Law Center and the National Partnership for Women and Families, the Intelligencer says.

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THE **careerist** a **lawjobs.com** blog

Sometimes a Girl Can't Win

Vivia Chen

July 20, 2010

Here's a hot tip for law firms that want to quash possible discrimination lawsuits by disgruntled women partners: Take those gals out of the income partner and of-counsel rank and give them equity – or something that kinda looks like equity.

In a big victory for Pittsburgh firm Dickie McCamey & Chilcote, the U.S. Court of Appeals for the Third Circuit ruled that Alyson Kirleis is barred from suing her firm for sex discrimination. The Legal Intelligencer says that the court based its ruling on her status as a shareholder and director, which "gives her the ability to participate in firm governance and a percentage of firm profits."

Reports the Legal Intelligencer:

> The appellate judges issued a tersely worded, four-page, nonprecedential opinion that adopted the lower court's reasons for dismissing the case on summary judgment.
>
> "We cannot agree that Kirleis is a mere employee of DMC, and our review of the record supports the district court's conclusion in this regard," Senior U.S. circuit judge Jane R. Roth wrote.

Because Kirleis was a Class A shareholder at her firm, the court said she had "the right not to be terminated without a vote by a supermajority of the firm's board." Hence, she couldn't "qualify as an employee under the multifactor test created by the U.S. Supreme Court." Only employees, reminded the court, have the right to sue for sex discrimination. (Kirleis argued that she should be "treated as an employee because her work is subject to the control of the firm's 13-member executive committee.)

I'm no expert on sex bias, but the ruling seems to bar claims of discrimination if you fall within the definition of equity, even though you might have suffered gender bias. Got that?

Indeed, Kirleis described some disturbing inequities at her firm that the court skipped over. Besides charging that her firm paid women lawyers less, she alleged:

> [S]he was told by a male partner that a woman with children should relinquish her partnership and work only part-time. Kirleis, who has worked at the firm since 1988, also claimed she was told by another male partner that the role of women lawyers was to prepare lawsuits for trials that would be handled by male lawyers. The suit also included allegations that Kirleis has suffered retaliation since her suit was filed, and that Dickie McCamey's annual Christmas party is effectively closed to women "because of the sexually explicit nature of the entertainment

> including skits, songs, pornographic materials, and props."

Skits, songs, pornography – what fun! Who says the Mad Men era is dead? I love the series, but would women lawyers want to suffer the indignities that befall Peggy Olson in the pursuit of her career?

Look, I don't know if all of Kirleis's allegations are true, but I wish the court probed deeper instead of relying on a formalistic definition of equity. Does it take that much imagination to realize there could be inequity in the equity ranks? As any first-year law student knows, it's best to buddy up with those on the compensation committee or the executive committee. It's also a no-brainer that those committees tend to be populated by men.

The Intelligencer reports that Kirleis's "remaining options have now dwindled to statistically unlikely ones – seeking a rehearing before all 14 judges on the Third Circuit or petitioning the U.S. Supreme Court to take up her case." (Her lawyer, Edward Friedman, told The Intelligencer that he intends to seek a rehearing before the full court.)

I don't see much of a silver lining in this case, but Cynthia Calvert, one of the founders of PAR (Project for Attorney Retention at Hastings Law School), finds one: "Although the law firm won the appeal, it may have lost the war to the extent its reputation and its ability to recruit and retain women lawyers have been damaged by the allegations."

Let's hope the firm cares. To me, though, the case still points to the perils of suing for discrimination – at any level. Do you have a happier view?

If you have topics you'd like to discuss, or information to share for The Careerist, e-mail chief blogger Vivia Chen at VChen@alm.com.

Female Lawyer's Discrimination Suit Dismissal Upheld

July 20, 2010 (PLANSPONSOR.com) – A federal appellate court has ruled that a female lawyer's status as shareholder and director in a Pittsburgh law firm effectively made her an employer and rendered her ineligible to sue the firm for sex discrimination.

The 3rd U.S. Circuit Court of Appeals ruled that it was the fact that attorney Alyson Kirleis participated in the governance of the Dickie McCamey & Chilcote (DMC) firm and received a share of its profits that was the critical issue, the Legal Intelligencer reported.

Because the law only allows employees – not employers – to sue for sex discrimination, the appellate panel found that U.S. District Judge Arthur J. Schwab of the U.S. District Court for the Western District of Pennsylvania was right to throw out the case. "We cannot agree that Kirleis is a mere employee of DMC, and our review of the record supports the district court's conclusion in this regard," Senior U.S. Circuit Judge Jane R. Roth wrote for the appellate court.

Kirleis argued in papers filed with the appellate court that she should be treated as an employee because her work is "subject to the control of" the firm's 13-member executive committee.

In her suit, Kirleis accused Dickie McCamey of paying female lawyers less than males and alleged she

was told by a male partner that a woman with children should relinquish her partnership and work only part-time. Kirleis also charged that she was told by another male partner that the role of women lawyers was to prepare lawsuits for trials that would be handled by male lawyers, and that the firm had retaliated against her since her suit was filed.

"We're gratified by the 3rd Circuit's affirming of the judge's decision and pleased that the firm has been vindicated," said Jeffrey T. Wiley, the managing director and chief operating officer of Dickie McCamey, according to the news account.

Fred Schneyer

editors@plansponsor.com

NEW JERSEY EMPLOYMENT LAW BLOG

Home > Gender Discrimination & Sexual Harassment >

Posted By Frank Steinberg on 07/20/2010

Two New Salvos from Different Fronts in the Workplace Gender Wars

Two recent decisions illustrate distinctly different sides of the conflicts between men and women that percolate into our courtrooms. Neither is a New Jersey case, but there are lessons for for [sic] Garden Staters in both.

In Kirleis v. Dickey, McCamey & Chilcote, P.C., the plaintiff Alyson Kirleis sued the defendant law firm, of which she was a partner, for gender discrimination, claiming that she was paid less than her male counterparts. She sued under Title VII, the Equal Pay Act, and a Pennsylvania discrimination statute. **The issue was whether Kirleis, as a partner in a professional services firm, was an "employee" of the firm, a status that would allow her to sue, or an "employer," which would not.** The trial court found that Kirleis was an employer and thus found in favor of the law firm.

Kirleis appealed to the U.S. Court of Appeals for the Third Circuit. She fared no better there. In a four page (that's really short, kids), non-precedential opinion, the court affirmed the judgment of the trial court. **The court reviewed the six factors laid out by the Supreme Court in *Clackamas v. Wells*, and**

found that Kirleis in fact was a partner in more than name only, and thus was an employer.

The *Kirleis* decision has implications for all professional services firms, not just law firms. An important lesson to take from this case is that, in order to avoid discrimination claims between partners, care must be taken in setting up a corporate governance structure. Properly done, problems can be avoided. Do it improperly, though, and there can be big problems that could have significant financial ramifications for the organization.

A claim of sexual harassment is the basis for a $7.3 million trial verdict in *Redman v. Bernstein, Shur*, recently tried in the Superior Court of Maine. We say "basis of" the verdict because the case was a claim for legal malpractice, not a direct claim for sexual harassment.

The facts are contained in this opinion disposing of the parties' cross-motions for summary judgment. In short, there was a battle between brothers for control of a family-owned business. One brother learned that there was a plot afoot to make him look bad, and a short time later he was accused by a female employee of sexual harassment. The Bernstein Shur firm was consulted on the matter. **The jury found that they were negligent in how they handled the harassment claim and awarded $7.3 million against them, ALL of it for emotional distress.**

An extreme case with an eye-popping result? Yes, but it serves to emphasize how carefully employers and their attorneys must treat claims of sexual harassment.

Above the Law

25 Jul 2010 at 3:05 PM **3RD CIRCUIT. GENDER. PARTIES. PARTNER ISSUES. WOMEN'S ISSUES**

Third Circuit Affirms Dismissal of Female Partner's Discrimination Case

By **KASHMIR HILL**

There's a serious gender-based wage gap in the legal profession. Female partners make $66K less than male partners on average. If you're a female partner who has thought about tackling that gap with a lawsuit, you may be interested in the case of Alyson J. Kirleis.

Kirleis, a shareholder at Dickie McCamey in Pennsylvania, has been pursuing a sexual discrimination suit against her firm for the last four years. From the Legal Intelligencer (via The Careerist):

> In the suit, Kirleis accused Dickie McCamey of paying female lawyers less than males and alleged she was told by a male partner that a woman with children should relinquish her partnership and work only part-time.
>
> Kirleis, who has worked at the firm since 1988, also claimed she was told by another male partner that the role of women lawyers was to prepare lawsuits for trials that would be handled by male lawyers. The suit also included allegations that Kirleis has suffered retaliation since her suit was filed, and that Dickie McCamey's annual Christmas party is effectively closed to women

> "because of the sexually explicit nature of the entertainment including skits, songs, pornographic materials and props."

The Legal Intelligencer pointed out that her suit could have broken new legal ground, establishing that "some law firm partners are not equal to their fellow partners and ought to be allowed to pursue employment discrimination claims such as suing for equal pay."

But the Third Circuit wasn't on board . . .

Being a shareholder means she can't sue:

> A woman lawyer cannot sue her firm for sex discrimination if her status as a shareholder and director gives her the ability to participate in firm governance and a percentage of firm profits, the 3rd U.S. Circuit Court of Appeals has ruled . . . [T]he appellate judges issued a tersely worded, four-page, nonprecedential opinion that adopted the lower court's reasons for dismissing the case on summary judgment.
>
> "We cannot agree that Kirleis is a mere employee of DMC, and our review of the record supports the district court's conclusion in this regard," Senior U.S. Circuit Judge Jane R. Roth wrote.

Only employees can sue for sex discrimination. Vivia Chen suggests in The Careerist that this is great news for law firms that want to steer clear of sex discrimination suits:

> Here's a hot tip for law firms that want to quash possible discrimination lawsuits by disgruntled

> women partners: Take those gals out of the income partner and of-counsel rank and give them equity – or something that kinda looks like equity.

This suggests that if you have equity, you have equality – despite what studies show.

***UPDATE*: The issue of whether partners can be considered "employees" for purposes of federal discrimination law is not new. Back in 2007, Sidley Austin reached a settlement with the EEOC. As explained by the ABA Journal, the EEOC "contended that a number of Sidley partners were actually employees – and hence protected by laws against age discrimination – because the firm treated them as employees even though it called them partners."**

3rd Circuit Tosses Sex Bias Lawsuit by Law Firm Shareholder [Legal Intelligencer]

Sometimes a Girl Can't Win [Careerist]

Earlier: Wage Gap Persists Among Female Partners: Where's the Outrage?

NEW YORK EMPLOYMENT
LAWYER BLOG
THE OTTINGER FIRM

Posted On: **July 24, 2010** by Robert Ottinger

Female Law Partner Loses Sex Discrimination Case

As reported yesterday in Above The Law, the Third Circuit Court of Appeals rejected a sex discrimination case filed by a female law partner. The partner, Alyson Kirleis, worked for Dickie McCamey in Pennsylvania since 1988. From the Legal Intelligencer (via Above the Law who got if [sic] from The Careerist):

> In the suit, Kirleis accused Dickie McCamey of paying female lawyers less than males and alleged she was told by a male partner that a woman with children should relinquish her partnership and work only part-time.
>
> Kirleis, who has worked at the firm since 1988, also claimed she was told by another male partner that the role of women lawyers was to prepare lawsuits for trials that would be handled by male lawyers. The suit also included allegations that Kirleis has suffered retaliation since her suit was filed, and that Dickie McCamey's annual Christmas party is effectively closed to women "because of the sexually explicit nature of the entertainment including skits, songs, pornographic materials and props."

The Court apparently was unmoved by fairly clear evidence of unequal treatment. It is known that female law partners earn about $66K less per year then male partners and Ms. Kireis [sic] was clearly facing different standards than men. Nonetheless the Court held that a law partner cannot sue her own law partnership because she is an owner and has some control over management and policies herself. This ruling looks like a cop out to me because it seems pretty clear that Ms. Kirleis did not have the ability to impact the firm's treatment of women – if she did she probably would have raised her pay and punished her bigot partners. She clearly did not have enough votes so she looked to the courts for help and got nothing. I hope she appeals this one to the USSC that now has more female members.

Posted by Robert Ottinger

The Legal Intelligencer

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Sex Discrimination Ruling Highlights Dilemma for Female Partners

By Gina Passarella
08-03-2010

Analysis

The recent 3rd U.S. Circuit Court of Appeals' decision in *Kirleis v. Dickie McCamey & Chilcote,* in which a female partner was unable to sue for sex discrimination because she had voting rights and shared in firm profits, did little to change the law but much to bring to the fore the issue of parity between men and women lawyers.

Alyson Kirleis was asking the 3rd Circuit to revive her case, arguing that despite her titles of shareholder and director, she should be treated as an employee because her work is "subject to the control of" the firm's executive committee.

In the suit, Kirleis accused Dickie McCamey of paying women lawyers less than men, and alleged she was told by a male partner that a woman with children should relinquish her partnership and work only part-time. Kirleis, who has worked at the firm since 1988, also claimed she was told by another male partner that the role of women lawyers was to prepare lawsuits for trials that would be handled by men.

The 3rd Circuit's brief opinion denying Kirleis' arguments was non-precedential, but wouldn't have changed the law on discrimination suits by partners in professional organizations even if it had precedential value, employment lawyers said.

"They applied the *Clackamas* standards and, quite frankly, this was a partner in a relatively small firm who did have the right to vote on some decisions and was paid a share of the profits and could not be easily removed," Flaster Greenberg employment lawyer Michael Homans said. "She truly looked like a typical, genuine small-firm partner and I don't think any of the decisions to date have suggested that that person, even if they are not the most powerful partner, are deemed an employee."

Homans was referring to the U.S. Supreme Court's 2003 decision in *Clackamas Gastroenterology Associates v. Wells*, in which the court recognized not every partner should automatically be deemed an employer, but outlined a six-prong test to determine whether the partner was more akin to an employee or employer.

Homans said *Kirleis* is just part of a larger trend in which professional services partners – particularly lawyers – are not hesitant to raise the issue of whether they are protected by discrimination laws. The topic has come up in recent age discriminations cases brought against Sidley Austin and Kelley Drye & Warren.

Progress Still Needed

For Fine Kaplan & Black's Roberta D. Liebenberg, chairwoman of the American Bar Association's Commission on Women in the Profession, *Kirleis* is just another reminder that the percentages of women in equity partner ranks and women in true positions of power have not changed.

And with no legal protections under discrimination laws once women achieve equity status, Liebenberg said this case further outlines the need for "commitments from the top management to really make this a priority."

The number of women graduating law school and the number of female-geared programs within law firms have left many with the impression that "the job is done," she said. But, Liebenberg said, the lack of women in power positions "should be an alarm."

Studies by the commission, the Minority Corporate Counsel Association and the Project for Attorney Retention have shown that female attorney attrition is driven in large part by their being under-compensated and under-recognized, she said.

The latest study by MCCA and PAR, which came out in April, showed that 55 percent of women partners said they were occasionally or frequently denied their fair share of origination credit and about 30 percent said they were intimidated or bullied when they objected to the origination credit they received.

Another takeaway from these studies, Liebenberg said, was that the committees women tend to be placed on are rarely those whose members tend to receive greater compensation.

One of the best practices these organizations are touting is for in-house counsel to be aware of the ramifications of pay and power disparity and get involved in ensuring these women are retained.

Carol Tracy of the Women's Law Project in Philadelphia, which filed an amicus brief on Kirleis' behalf, said she hopes the case will be reheard en banc and overturned.

If applied as decided, Tracy said, "it will severely limit access to justice" for female and minority attorneys.

"If title alone can determine whether discrimination laws apply, this could lead to significantly more discrimination," she said.

Along with the studies that show inequalities in compensation and assignments between male and female partners, Tracy said she hears from female attorneys more than one would expect about pay disparity and not being given origination credit. And she more often hears from the senior female attorneys rather than associates, she said.

Law firm life hasn't been as daunting for every female attorney. Sarah E. Davies, an equity partner with Cozen O'Connor, said she couldn't imagine

hearing the comments allegedly said to Kirleis at either of the two firms she has worked.

Davies said she does think it's the case that women are lagging when it comes to management committees and office managing partner positions.

"Partly that's because, frankly, it wasn't until my generation or people younger than me that women started being half of law firms," Davies said.

"There aren't a lot of women in their mid-50s who are partners," she said. "There just aren't that many."

Davies said the lack of women in leadership may be a timing issue. She said she has seen women in their mid-30s to mid-40s begin to take on leadership positions. She said she hopes that in the next five to six years, women begin to take on more of those roles.

What Firms Can Do

Though they have some legal protection, there are best practices for law firms as well when it comes to minimizing the risk of discrimination complaints.

Harrisburg-based Brian F. Jackson, co-chairman of McNees Wallace & Nurick's labor and employment group, said every law firm should be looking at this issue in terms of what segment of their professionals are owners in that they have a share of profits and losses and liabilities, that they have some significant degree of practice autonomy and that they have influence in the organization through voting rights.

The firms should then look at what policies and practices they have in place that apply to that class of owners' ability to complain about poor treatment or compensation concerns, he said.

"All professional organizations have spent more time looking at their classes of professionals to determine which ones would truly satisfy the ownership criteria," Jackson said. "And any good organization, even for those owners, will have processes . . . that would permit even an owner to try to present a concern or complaint internally for a resolution."

Many firms have an arbitration process, but the best course of action is to ensure there is first an internal, non-adversarial method of airing complaints, Jackson said.

And the process should really be uniform for sex, age or other forms of discrimination complaints, he said.

"There shouldn't be any difference because you are paying me less because I'm about to retire or a middle-career female or [have] a record of impairment," Jackson said about how the *Clackamas* criteria is applied to these cases.

How the U.S. Equal Employment Opportunity Commission will apply those standards and prosecute those cases, however, remains to be seen, he said.

Homans said the larger firms are more vulnerable because of the varying degrees of partnership status. Someone in a firm where partnership votes are rarely taken, the partner does not control his or her own

book of business and the partner could be fired without a vote by the shareholders could present a potentially viable discrimination claim as an employee, he said.

When it comes to age discrimination, Homans said the EEOC is clearly pushing ahead with those types of cases involving law firms. So as long as these issues are on the EEOC's radar, they should be on law firms' radar screens too.

"I don't think this issue is going away anytime soon," Homans said.

THE
CONGLOMERATE
BUSINESS LAW ECONOMICS SOCIETY

August 10, 2010

Fiduciary Duty to Partners v. Anti-Discrimination Laws: Which Protects Better?

Posted by Christine Hurt

So, the media has been abuzz with two different law partner stories in the past few weeks. First, that a new study has found that female law partners at elite firms are paid, on average, $66,000 less per year than their male law partner counterparts, who make up 80% of all law partners. Second, that the Third Circuit has held that a female "Class A Shareholder" at law firm Dickie, McCamey & Chilcote, a Pennsylvania professional corporation, could not proceed with her discrimination claims under Title VII or the Fiarl [sic] Labor Standards Act because she was an "employer," not an "employee." (2010 WL 2780927, or Law.com story here.) So, this leaves me wondering, if a female law partner believes that she is being discriminated against by her other partners on the basis of gender, does she have any recourse at all beyond exiting the partnership?

First, there is the question of whether a law partner (or shareholder in a professional corporation) could ever be an employee for purposes of employee discrimination laws. The courts seem to look at the common-law agency test for whether someone is an employee, which focuses on control. The Seventh

Circuit in EEOC v. Sidley Austin Brown & Wood seemed to leave that door open as to whether a partner could be an employee, particularly for partnerships with hundreds of partners and a self-perpetuating Executive Committee that had plenary power (settled, so no legal conclusion). But, Alyson Kirleis was found not to be an employee in a firm with 61-69 Class A Shareholders, all of whom were a director on the Board of Directors, in a firm run by an Executive Committee elected by the Board. So, if you aren't promoted from Associate to Partner on the basis of gender, you may have a claim, but once you're a partner, you may not.

So, the second question would be whether a partner in a general partnership or a shareholder in a professional corporation would have any other remedies against the firm. Particularly, could partnership fiduciary duties or shareholder oppression doctrines provide some sort of safeguard? We all know from studying business associations that a minority partner or a minority shareholder, particularly in a closely-held enterprise where one's livelihood is part of the bargain, can be put in a less-than-economically pleasant situation by the majority.

Fiduciary Duty. We typically think that partnership duties will step in if the firm is a general partnership, even if safeguards such as voting are not effective. However, does discriminating against a partner on the basis of gender violate the duty of care? The duty of loyalty? Perhaps if compensation determinations were made unfairly, that would be

self-dealing? I'd be interested to know if any BA casebook writers have found any of those cases. Lack of transparency in allocating partner compensation might be a Duty of Disclosure issue, but that just gets you information. But hostile environment claims don't seem to fit in anywhere.

Good Faith. Perhaps if compensation decisions aren't being made exactly as the partnership agreement mandates, this might be a breach of contract claim, or at best a breach of the duty of good faith and fair dealing, as good as that goes. But a claim that says that compensation decisions under the partnership agreement have a disparate impact on childbearing women because of its weight on billables and client origination? That doesn't seem to be a fiduciary duty or other duty-type claim.

Shareholder Oppression. As we know, some states recognize this doctrine to save shareholders in closely-held situations from losing their livelihoods and having their investments captive without hope of dividends, etc. So, if the professional corporation statute is governed by the jurisdiction's for-profit corporation act, which includes some shareholder oppression remedy, then perhaps this is an option. In Ms. Kirleis' situation, she was one of over 60 Class A Shareholders, so that may not be a closely-held corporation under a particular state law. And, she wasn't fired or demoted. Presumably, she had some exit rights. She was still receiving a draw. Oppression may in fact be a much higher bar than discrimination.

So, perhaps the fact that only 20% of law partners are women seems to reflect the "exit" remedy.

Hunton Employment & Labor Law Perspectives : Employment Lawyers & Attorneys : Hunton & Williams Law Firm : Labor Law Legislative Updates

Published By
Hunton & Williams

Law Firm Shareholder Does Not Qualify To Bring Workplace Discrimination Claims

Posted on August 23, 2010 by Hunton & Williams LLP

According to recent federal court decisions, a shareholder, director, or other individual holding a similar position in a corporation may find his or her job status disqualifies him or her from legal relief under many state and federal anti-discrimination laws should such individual believe that he or she has been the subject of unfair treatment in the workplace. In *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, No. 09-4498 (3rd Circuit July 14, 2010), the U.S. Court of Appeals for the Third Circuit affirmed a district court's ruling that a law firm shareholder was not an "employee" of the professional corporation protected by federal and state anti-discrimination laws.

In *Kirleis,* Alyson J. Kirleis filed a lawsuit against Dickie, McCamey & Chilcote. P.C., the law firm in which she was a shareholder, claiming sex discrimination, sexual harassment, unequal pay, and retaliation under both federal and state anti-discrimination laws. Among other things, Kirleis alleged that she received less pay than her male counterparts and

that discriminatory and harassing comments were made to her during her employment with the firm. Among other allegations, Kirleis alleged that she was informed that she should give up her shareholder status to spend more time with her children. She also claimed that she was told that "gals" in the firm should do lower level legal tasks, while the male lawyers took such cases to trial. The U.S. District Court for the Western District of Pennsylvania granted summary judgment to the law firm, based on the threshold question of whether Kirleis was an "employee" protected under the federal and state laws, or an "employer" without such protections. The district court held that certain factors of Kirleis's shareholder position disqualified her from protection as an "employee" as defined by the federal and state laws, including Title VII and the FLSA.

In making its decision, the district court relied upon the six factors set out in a 2003 U.S. Supreme Court decision, *Clackamas Gastroenterology Associates, P.C. v. Wells,* which the Court used to determine whether a shareholder-director of a professional corporation is an employee or employer for application of federal anti-discrimination laws. The six factors were based on a standard defined by the Equal Employment Opportunity Commission and focused on the amount of control the employing entity had over the shareholder-directors at issue.

In affirming the district court's decision, the Third Circuit agreed with the district court's application of the *Clackamas* decision. In particular the Court held

that, because Kirleis was entitled to a percentage of the law firm's profits and losses, could not be terminated from employment for cause without a three-fourths majority vote of the Board of Directors, and participated in firm governance, she was not a "mere employee" of the firm and therefore did not qualify for protection under federal and state anti-discrimination laws.

No. 10-562

In the
Supreme Court of the United States

ALYSON J. KIRLEIS,

Petitioner,

v.

DICKIE, McCAMEY & CHILCOTE, P.C.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the district court and the Third Circuit Court of Appeals applied well-settled law in granting and affirming summary judgment in favor of Respondent, a professional corporation and law firm, because, as a class A shareholder/director, Petitioner is a statutory employer by virtue of her numerous attributes of ownership under the test articulated by this Court in *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440 (2003), and, therefore, is precluded from bringing claims under the various anti-discrimination laws.

STATEMENT PURSUANT TO RULE 29.6

Dickie, McCamey & Chilcote, P.C. is owned by its shareholder/directors. As such, there is no parent or publicly held company owning 10 percent or more of the stock of Dickie, McCamey & Chilcote, P.C.

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COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case contains not only multiple inaccuracies and immaterial allegations but, more importantly, omits critical undisputed facts. The following counter-statement of the case accurately reflects the relevant portions of the undisputed factual record, as well as the decisions of the lower courts:

I. The Parties

Respondent is a Pittsburgh-based law firm and professional corporation. (App. 640a [para. 12].)[1] Petitioner is an attorney and has been licensed to practice law in the Commonwealth of Pennsylvania for over twenty years. (App. 242a.) Petitioner has practiced law at Respondent for her entire professional career, for ten years as an associate attorney, for three years as a class B shareholder, and for the past eight years as a class A shareholder/director, the only level of firm ownership. (App. 241a-242a.)

II. Respondent's Organization And Functioning

The relationship among Respondent's shareholder/directors and the relationship between Respondent's shareholder/directors and the corporate entity is governed by the by-laws of the corporation. (App. 216a-230a, 638a [para. 2], 647a-683a.) Pursuant to section 2.02 of the by-laws, all class A shareholder/directors, including Petitioner, are eligible

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[1] All citations to App. __ are references to the Appendix filed in the United States Court of Appeals for the Third Circuit.

to and do serve on Respondent's board of directors. (App. 159a, 217a-218a.) No associate attorney, class B shareholder, or other employee of Respondent may serve on the board. (App. 639a [para. 8].) As a voting member of Respondent's board of directors since January 1, 2001, Petitioner and her fellow shareholder/directors have voted on or have had the opportunity to participate in deciding a myriad of significant management issues. (App. 241a, 280a, 284a, 396a-401a, 467a-563a, 685a-801a, 812a-854a, 901a-902a, 912a-914a, 916a-940a.)

Respondent's by-laws specifically reserve certain decisions to the board, and pursuant to section 4.03(e) of the by-laws, the board has delegated certain decisions to Respondent's executive committee. (App. 216a-230a, 223a). Additionally, under section 4.03(a) of the by-laws, Petitioner, like all other shareholder/directors, is eligible if nominated and elected by her fellow shareholder/directors to serve as: (a) president and chief executive officer; (b) managing director and chief operating officer; (c) secretary/treasurer and chief financial officer; (d) member of the executive committee; (e) chairperson of any of Respondent's committees; (f) member of the peer review committee, which reviews all other shareholder/directors, including the president; and (g) Respondent's general counsel. (App. 222a.)

III. Becoming A Shareholder/Director Of Respondent

Respondent does not "hire" class A shareholder/directors. Rather, shareholder/directors are elected by an affirmative three-fourths vote of all class A shareholder/directors. (App. 216a-230a.)

Petitioner herself was elected as a class A shareholder/director of Respondent, effective January 1, 2001, in accordance with an election held pursuant to section 3.08 of the by-laws. (App. 221a-222a, 641a [para. 20].) Following her election, Petitioner has actively participated in the election of new class A shareholders/directors.

Similarly, Respondent's shareholder/directors, including Petitioner, cannot be fired by Respondent. Rather, a shareholder/director's relationship with his or her fellow shareholder/directors can only be terminated according to section 2.09 of the by-laws by an affirmative vote of three-fourths of the other class A shareholder/directors and only "for cause." (App. 219a, 641a [para. 21].)

IV. Shareholder/Directors' Control, Independence, And Influence Over Their Work And Respondent's Managerial Decisions

Respondent's shareholder/directors, including Petitioner, are not subject to Respondent's rules and regulations. Rather, by virtue of their status as class A shareholder/directors and voting members of the board of directors, Petitioner and her fellow shareholder/directors have the ability to establish the rules and regulations governing the firm.

Further, Respondent's shareholder/directors, including Petitioner, handle their cases as they see fit. (App. 162a-167a, 191a-205a, 259a-274a, 289a-290a, 302a-316a, 359a-361a, 412a-428a, 438a-446a, 660a-672a, 891a-899a, 941a-1006a.) By way of example, Petitioner admitted that, based upon her own

professional judgment, consistent with the interests and input of clients, she formulates the trial strategy on her cases – this is especially true for the work Petitioner has done for her own clients, wherein she consults with and reports to no one. (App. 161a, 293a-301a, 362a-367a, 428a-433a, 451a-453a, 900a.) Moreover, as a class A shareholder/director, Petitioner supervises other attorneys, including associates and other shareholders, as well as Respondent's support staff, on a regular basis. (App. 262a-266a, 372a-387a, 1007a-1049a, 2792a.)

Respondent's class A shareholder/directors enjoy complete discretion to expend Respondent's money for client entertainment expenses for all existing firm clients and for other business purposes. (App. 368a-371a, 627a-636a, 642a [para. 26].) By way of example, as a class A shareholder/director, Petitioner can and has approved her own firm expense reimbursement requests. (App. 627a-636a, 642a [para. 26].) Associate attorneys and other employees, on the other hand, must obtain prior approval from a shareholder/director to spend Respondent's money. (App. 642a [para. 27].) Petitioner also has the authority to reasonably approve the expenditure of Respondent's funds by associate attorneys and other employees. (App. 642a [para. 28].)

While it is true that Respondent's executive committee sets shareholder compensation and that the confidentiality of the same is maintained, this fact does not beget the conclusion that Petitioner or any of her fellow shareholder/directors "reported to" the executive committee. To the contrary, pursuant to section 4.03(e) of the by-laws, the board of directors specifically has delegated certain decisions to the executive committee, including "the determination of

compensation to be paid to all Shareholders, Officers, Directors, and employees of the Firm." (App. 223a.) Pursuant to section 4.03(f) of the by-laws, records relating to compensation paid, or to be paid, to officers, directors, or shareholders must remain confidential "unless disclosure of all or any part thereof shall be required by a majority vote of the Class A Shareholders." (App. 223a.) Thus, pursuant to section 4.03(f) of the by-laws, the board of directors has the right and the ability to amend the by-laws of the firm to permit and/or require disclosure of the allocated percentage share distribution and projected compensation for each individual shareholder/director. (App. 223a.) Notably, during the relevant time period, no class A shareholder/director, including Petitioner, has ever requested disclosure of the allocated percentage share distribution/compensation for other class A shareholder/directors. (App. 170a.) Further, pursuant to section 1.03(b) of the by-laws, Petitioner, like all other class A shareholder/directors, can vote on amendment and repeal of the by-laws. (App. 216a-217a.)

Finally, as class A shareholder/directors and voting members of the board of directors, Petitioner and her peers have a meaningful opportunity to exert substantial influence over Respondent's managerial decisions. Indeed, throughout her relationship with Respondent, Petitioner has had ample opportunity to share, and has shared, in the management and control of her corporation. The record is replete with examples of these opportunities. She has imposed her will on Respondent through management service on various committees and through shareholder votes, in which she has not hesitated to take positions adverse to the executive committee and her other fellow class

A shareholder/directors. (App. 91a-111a [para. 42], 123a-125a [paras. 87-92], 130a-131a [paras. 114-115].)

V. Intent Of The Parties

Respondent's by-laws reflect the intent that shareholder/directors are owners of the professional corporation and as such are employers, not employees, of the firm. The by-laws govern equity interests in Respondent, the rights and duties to participate in management, exposure to liability, participation in profits and losses, capital investment in the firm, voting rights, calculations of distributions and the security inherent in the fact that a shareholder/director can only be expelled by a three-fourths vote of his or her fellow class A shareholder/directors. (App. 216a-230a, 641a [para. 21].) Also, pursuant to section 3.08(g) of the by-laws, Petitioner, like all other class A shareholder/directors, receives a package of financial benefits that associate attorneys and other employees do not receive. (App. 159a-160a, 639a [paras. 3-4].) Since becoming a class A shareholder/director, Petitioner has availed herself of these rights and benefits. (App. 279a, 434a-437a, 639a [paras. 5-6].)

VI. Shareholder/Directors Sharing In The Profits, Losses, And Liabilities Of Respondent

Upon her election as a class A shareholder/director of Respondent, like all class A shareholder/directors, Petitioner was required pursuant to section 4.03(e) of the by-laws to make a capital contribution of $7,500 to Respondent, which she has done, and to respond to any future capital calls, even if to pay her own judgment. (App. 207a, 246a-246a.) No associate

attorney/employee or other employee makes any capital contribution to Respondent. (App. 643a [para. 31].) Petitioner's capital account is at risk. Should Respondent not have the assets to pay an obligation, a creditor could attach and take Petitioner's entire capital account, as well as the capital accounts of all other class A shareholder/directors, to satisfy an obligation owed by Respondent to the creditor. (App. 643a [para. 32].)

As a class A shareholder/director, Petitioner's compensation, like that of all other class A shareholder/directors, is determined by the net profits of Respondent each year. (App. 171a, 174-175a, 216a-230a.) Petitioner's compensation, like all other class A shareholder/directors, is set in January of each year for that calendar year by Respondent's executive committee, on which she is eligible to serve upon election or appointment. (App. 172a, 216a-230a, 402a-410a.) Petitioner's compensation, like that of all other class A shareholder/directors, is set as a percentage of Respondent's anticipated yearly profit. (App. 171a, 654a.) Petitioner, like all other class A shareholder/directors, is advised in writing what her estimated distribution in dollars will be if Respondent makes exactly 100 percent of its projected net distributable profit. (App. 172a, 402a-410a.) As a class A shareholder/director, Petitioner's actual compensation is a function of her percentage of Respondent's profits. (App. 171a, 654a.) Class A shareholder/directors divide the net profits based on their allocative percentage share as set each January. (App. 411a, 903a-905a.) As a result, Petitioner's final annual compensation may be more or less than the estimated distribution made the preceding January. (App. 411a, 903a-905a.)

When Respondent's net distributable profits exceeded estimated net distributable profits, Petitioner earned even more than was projected at the beginning of the year. (App. 326a-339a, 402a-411a.) In each year that Respondent actually realized more net profit than projected, no associate attorney or other employee received a percentage of any increased profits. (App. 644a [para. 33].)

When Respondent's net distributable profits fell short of the estimated net distributable profits, Petitioner earned less than was projected at the beginning of the year. (App. 326a-339a, 402a-411a.) In each year that Respondent actually realized less net profit than projected, no associate attorney or other employee experienced a decrease in their fixed compensation. (App. 644a [para. 34].)

Petitioner, like all other class A shareholder/directors, has seen a decline in her compensation in years that Respondent's net distributable profit has been less than was available the prior year. (App. 326a-339a, 402a-411a.)

In the proceedings below, Petitioner admitted that her compensation is linked to Respondent's net profits, rising and falling in tandem with its net distributable income, *i.e.*, profit. (App. 326a-339a, 402a-411a.) Thus, her income exceeded the January projection in years in which Respondent's profits were larger than anticipated. Similarly, when Respondent failed to achieve its projected profits, Petitioner's year-over-year income fell. This was true even if Petitioner's percentage interest in the net profits was larger in the subsequent year. (App. 326a-339a, 402a-411a.)

VII. The Proceedings Below

On November 9, 2006, Petitioner filed her first complaint against Respondent in the United States District Court for the Western District of Pennsylvania, alleging sex discrimination and retaliation in violation of the Equal Pay Act/Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and the Pennsylvania Human Relations Act. On December 18, 2006, Petitioner filed a second complaint, making similar allegations to those set forth in her first complaint but with more factual detail. The district court consolidated the actions on January 12, 2007. (Pet. App. 10-12.)

At a case management conference held on June 11, 2009, the district court granted Respondent's motion for bifurcation of discovery and dispositive motion proceedings. The court then directed that the parties conduct such proceedings in two phases, with the initial phase being limited to issues relating solely to Petitioner's status as an employer/owner or employee. The parties then engaged in phase one discovery, which closed on July 15, 2009. (Pet. App. 17.)

On July 30, 2009, Respondent moved for summary judgment, noting that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law because Petitioner could not meet her burden to establish that she was an employee within the meaning of the applicable statutes. By opinion and order dated October 28, 2009, Judge Arthur J. Schwab granted the motion for summary judgment. Applying the test set forth by this Court in *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440 (2003), the district court correctly reached the

inescapable conclusion that as a class A shareholder/director possessing not one, but all of the attributes indicative of ownership status, Petitioner was an employer/owner who was not entitled to invoke the federal anti-discrimination laws. (Pet. App. 8-77.)

Petitioner filed an appeal with the United States Court of Appeals for the Third Circuit, arguing that the district court erred on every point of its *Clackamas* analysis. On July 15, 2010, the Third Circuit affirmed the district court's order granting summary judgment in favor of Respondent, holding the undisputed material facts of record conclusively demonstrated that Petitioner was an employer/owner of Respondent as a matter of law. (Pet. App. 1-5.) The Third Circuit denied Petitioner's subsequent requests for rehearing en banc and panel rehearing. (Pet. App. 79-80.)

REASONS FOR DENYING THE WRIT

I. The Criteria Set Forth In Supreme Court Rule 10 Are Not Satisfied

Petitioner provides absolutely no plausible factual or legal basis for her petition. The decisions below do not conflict with a decision of this Court or any court of appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not met her stringent burden of demonstrating "compelling reasons" for the petition to be granted. *See* Sup. Ct. R. 10.

This case simply is not one in which certiorari should be granted. The instant action does not meet any of the general criteria set forth in SUP. CT. R. 10. "A petition for writ of certiorari will be granted only for

compelling reasons." *Id.* Further, a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." *Id.* The petition before the Court is based on the invalid argument that the courts below made erroneous factual findings and that there is an important principle of law at issue. There is not.

Petitioner contends that the courts below made erroneous factual findings, apparently because they did not adopt her self-serving interpretation of the facts. (Petition, pp. 11-12.) However, Petitioner's version of the facts is not supported by the evidence of record, which she conveniently fails to reference or include in her appendix. To the contrary, the undisputed material facts, as set forth by Respondent, are supported by the evidence of record, and the courts below so ruled.

More importantly, even if there were erroneous factual findings, which there were not, such is not a basis on which certiorari is granted. A writ of certiorari will not be granted to review evidence or inferences drawn from the evidence. *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175 (1938). The decision by the court of appeals is not to be disturbed unless plainly without support. *United States v. Chem. Found.*, 272 U.S. 1 (1926). Certiorari should be denied when the decision of the court of appeals is a fair assessment of the record because the Supreme Court does not grant a writ of certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220 (1925). Petitioner here seeks exactly that – certiorari for no other reason than to have this Court wade through the several-

thousand-page record in search of a triable claim that both the court of appeals and district court could not find. This does not meet the compelling reason standard for granting certiorari in SUP. CT. R. 10.

Although Petitioner argues that the courts below misapplied the standard articulated by this Court in *Clackamas*, she does not supply any legal authority to support her argument. Moreover, even if the court of appeals or the district court had misapplied the principle, which they did not, an asserted misapplication of a stated rule of law is not recognized by SUP. CT. R. 10 as a reason for granting a writ of certiorari.

Petitioner argues this case somehow presents an "important issue" and cites various online blogs and internet articles discussing her complaints and the decisions below. However, this Court does not sit to satisfy even scholarly interests in issues or for the benefit of particular litigants. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70 (1955). In any event, if one were to accept internet visibility and online media attention as appropriate factors for determining whether this Court should grant certiorari, such matters as the family law case involving the custody of Britney Spears' children, by Petitioner's reasoning, thus would warrant consideration by this Court, as a Google search of the terms "Britney Spears custody case" yields nearly five hundred thousand search results.

This case also does not meet any of the specific criteria set forth in SUP. CT. R. 10(a-c). The court of appeals has not entered a decision in conflict with a decision of another United States court of appeals.

SUP. CT. R. 10(a). In fact, all courts of appeals which have been called upon to apply *Clackamas* to circumstances factually analogous to those presented here have, like the Third Circuit in this case, found the individual in question to be an employer/owner not covered by the anti-discrimination laws. A decision by a state court of last resort is not involved. SUP. CT. R. 10(b). Nor does this case involve the situation where the court of appeals has decided an important question of federal law that has not been, but should be, decided by this Court, or has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c). *Clackamas* controls the outcome of this case and was properly applied by the courts below. Petitioner's arguments are not compelling reasons for which a petition for certiorari should be granted. Accordingly, applying the governing considerations for granting a petition for writ of certiorari to the instant petition, it is clear that the petition should be denied.

II. The Courts Below Correctly Concluded As A Matter Of Law Based Upon Undisputed Material Facts That Petitioner Is An "Employer" Within The Meaning Of The Anti-Discrimination Laws And Thus Cannot Assert Claims Under Those Statutes

A. The Courts Below Properly Applied The Test Set Forth By This Court In *Clackamas*

The issue in this case is whether Petitioner is properly considered an "employer" who may not assert claims under the anti-discrimination laws or whether

she must be deemed an "employee" covered by those statutes. This determination is controlled by the decision of this Court in *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003). The courts below properly analyzed Petitioner's employment status within the confines of the test set forth in that case, giving careful consideration to each of the following factors:

> (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> (2) Whether and, if so, to what extent the organization supervises the individual's work;
>
> (3) Whether the individual reports to someone higher in the organization;
>
> (4) Whether and, if so, to what extent the individual is able to influence the organization;
>
> (5) Whether the parties intended that the individual be an employee, as expressed in a written agreement; and
>
> (6) Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-50.

Applying the six *Clackamas* factors to the undisputed facts of record, the district court, and the court of appeals through its affirmance, determined

that all six factors compelled the finding that Petitioner is an employer because: (1) Petitioner shares in the profits, losses and liabilities of Respondent; (2) the totality of all relevant documents and the conduct of the parties over the years reflected the intent that Petitioner be considered an owner/employer; (3) Petitioner has had the ability to exert substantial influence over Respondent through the exercise of her voting rights under the by-laws and her service on management committees; (4) Petitioner's work is not supervised; (5) Petitioner does not report to anyone; and (6) unlike an employee, Petitioner can only be terminated from the professional corporation upon a showing of cause and the affirmative vote of three-fourths of her fellow class A shareholder/directors. The district court and the Third Circuit correctly applied the *Clackamas* factors and, therefore, concluded that Petitioner is an owner/employer as a matter of law.

Unhappy with the result reached by the courts below based upon their application of the undisputed facts of record to the factors articulated by this Court in *Clackamas*, and unable to offer even one point of decisional authority wherein a shareholder of a professional corporation practicing law was deemed to be an employee of the corporation, Petitioner now erroneously contends that the lower courts somehow misapplied this Court's decision in *Clackamas*. Petitioner's argument in this regard is an obvious red herring designed to create the appearance of reversible error where none, in fact, exists. Review of the *Clackamas* decision vis-à-vis the facts of record and the lower courts' opinions in this matter easily reveals the fallacy of Petitioner's argument.

B. The Courts Below Properly Determined That The First *Clackamas* Factor Weighs Heavily In Favor Of A Finding That Petitioner Is An Employer

1. The Courts Below Properly Found That Respondent Has No Ability To Hire Or Fire Petitioner

The first factor posed by this Court in *Clackamas* to determine whether a shareholder in a professional corporation is an "employee" or an "employer" for purposes of the anti-discrimination laws is "whether the organization can hire or fire the individual." *Clackamas*, 538 U.S. at 449. With respect to hiring, the undisputed facts, as summarized above, demonstrate that Respondent does not "hire" class A shareholder/directors. Rather, class A shareholder/directors are elected by an affirmative three-fourths vote of all class A shareholders. Petitioner herself was elected as a class A shareholder/director of Respondent, effective January 1, 2001, in accordance with an election held pursuant to section 3.08 of the by-laws. Following her election, Petitioner actively participated in the election of new class A shareholders/directors.

With respect to firing, Petitioner is not an employee at will and cannot be fired by Respondent or anyone at Respondent. Rather, Petitioner's relationship with her fellow class A shareholder/directors can only be terminated according to section 2.09 of the by-laws by an affirmative vote of three-fourths of the other class A shareholder/directors and only for cause.

Applicable case law confirms that the lower courts correctly found that the first *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent. Under similar facts, in *Cronkhite v. Unity Physician Group, P.C.*, 1:05-CV-1577, 2007 U.S. Dist. LEXIS 24884 (S.D. Ind. March 30, 2007), the district court, applying *Clackamas*, granted summary judgment in favor of a professional corporation finding that a shareholder physician was not an "employee" as a matter of law. Central to the court's analysis of the first *Clackamas* factor was the fact that Unity could not fire Dr. Cronkhite in the usual sense because under the physician employment agreement he could be terminated without cause only by a vote of 75 percent of Unity's board of directors. "This level of job security was not shared by non-shareholder physicians." *Id.* at *19.

In the instant matter, the three-fourths vote to terminate requirement set forth at section 2.09 of Respondent's by-laws is nearly identical to the 75 percent provision in *Cronkhite*, except that Petitioner can be removed by a vote of her peers only "for cause," providing her with an even higher level of job security than the physician in *Cronkhite*. This voting requirement also is comparable to the termination provision at issue in *Solon v. Kaplan, Begy & Von Ohlen,* 398 F.3d 629 (7th Cir. 2005) (another post-*Clackamas* decision, affirming summary judgment in favor of the defendant law firm because the plaintiff, a former general partner, was not an "employee" but, rather, was an "employer" as a matter of law), which required a two-thirds vote of the general partners of a law firm in order to involuntarily terminate Solon's relationship with the firm. The Seventh Circuit, in ruling that Solon was not an employee of the firm for

Title VII purposes, held that this benefit, along with others, "distinguished [Solon] from the firm's special partners and associates." *Solon*, 398 F.3d at 633; *see also Pearl v. Monarch Life Ins. Co.*, 289 F. Supp. 2d 324, 328 (E.D.N.Y. 2003) (holding that a shareholder physician was not an employee under a *Clackamas* analysis, in part because he "could be neither hired nor fired in the usual sense"). This distinguishing element is undisputedly present in this case as well and differentiates Petitioner from Respondent's associates to whom she wishes to compare herself. In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the lower courts rightly determined that the first *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent.

2. The Courts Below Properly Determined That Petitioner Has Ultimate Control Over The Rules And Regulations Of Her Work

In addition to examining the organization's ability to hire or fire an individual, the first *Clackamas* factor also directs the courts to evaluate "whether the organization can set the rules and regulations of the individual's work." *Clackamas*, 538 U.S. at 449. The courts below gave thorough consideration to this factor and, because the undisputed evidence demonstrates that Petitioner retained ultimate control over the rules and regulations of her work, correctly found that it weighed in favor of a finding that Petitioner is an "employer."

Petitioner's failed arguments notwithstanding, it is clear from the record that she has not been subject to Respondent's rules and regulations. Rather, through her status as a class A shareholder/director and a voting member of the board of directors, Petitioner has had the ability to help establish the rules and regulations of Respondent's operations. Although she attempts to downplay the significance of her class A shareholder/board member status, Petitioner cannot avoid her own admissions, most of which are in direct contradiction to the arguments set forth in her submissions to this Court and all of which confirm her power and influence within Respondent. Specifically, Petitioner has made the following significant admissions:

- She serves on Respondent's board of directors, whereas no associate attorney or other employee of Respondent may serve on the board. (App. 83a [paras. 14-15], 1059a [paras. 14-15].)

- Although she argues that board participation is "meaningless," Petitioner admits that she never declined a seat on the board of directors and has never resigned from the board. (App. 83a [paras. 16-17], 1059a [paras. 16-17].)

- All shareholders' votes are counted equally. (App. 90a [para. 40], 1066a-1067a [para. 40], 1223a [para. 885].)

- She has referred to herself as the "one woman in management," has referred to her service as the co-chair of the associates committee as a "management contribution," has described

herself as having "an active role in Firm administration," and has represented that she spent 250 to 300 non-billable hours per year performing her duties as co-chair of the associates committee. (App. 125a [paras. 89-92], 1087a [paras. 89-92].)

- Associate attorneys and other employees of Respondent do not have access to the detailed financial information that is provided to shareholder/directors on a monthly basis. (App. 87a [para. 33], 1062a [para. 33].)

- Associate attorneys and other employees of Respondent do not have a vote on the topics reserved for decision by the board of directors pursuant to section 3.08 of the by-laws. (App. 90a [para. 37], 1066a [para. 37].)

- Although she may call a special meeting of the board of directors, no associate attorney or other employee of Respondent enjoys that power. (App. 115a [paras. 63-64], 1081a [paras. 63-64].)

- No associate attorney or other employee of Respondent can vote on the election or termination of shareholders, adoption, amendment or repeal of the by-laws, or dissolution of Respondent, powers provided to shareholder/directors pursuant to section 1.03(b) of the by-laws. (App. 116a [para. 68], 1081a [para. 68].)

- No associate attorney or other employee of Respondent may vote to remove an officer from office, a power conferred upon shareholder/

directors by section 3.06 of the by-laws. (App. 116a [para. 73], 1082a [para. 73].)

- No associate attorney or other employee may propose the creation of a new committee, which shareholder/directors may do pursuant to section 4.01 of the by-laws. (App. 116a [para. 75], 1082a [para. 75].)

- No associate attorney or other employee may vote on the indemnification of any shareholder/director, which shareholder/directors are free to do pursuant to section 7.02 of the by-laws. (App. 117a [para. 77], 1082a [para. 77].)

- No associate attorney or other employee participates in setting the end date of the fiscal year of Respondent, as opposed to shareholder/directors, who participate in setting the end date of the fiscal year of Respondent pursuant to section 8.03 of the by-laws. (App. 117a [para. 79], 1082a [para. 79].)

- Transactions with associate attorneys and other employees are not voidable if their status as a participant in the transaction is not disclosed, whereas transactions between Respondent and shareholder/directors are voidable as interested transactions under section 8.05 of the by-laws if their status as a party to the transaction is not disclosed. (App. 117a [para. 81], 1082a [para. 81].)

- No associate attorney or other employee of Respondent, except those employees in the business office with a need to know, have access

to the salaries paid to all associate attorneys, respondent's management staff, paralegals and all support staff. Petitioner, on the other hand, had actual knowledge of associate attorney salaries by virtue of her position as co-chair of the associates committee and, as a shareholder/director, has access to the salaries of all other employees. (App. 126a [para. 95], 1088a [para. 95].)

- Associate attorneys and other employees must obtain prior approval from a shareholder/director to spend Respondent's money. (App. 126a [para. 99], 1089a [para. 99].)

Again, relevant decisional law discussing the foregoing attributes confirms that the lower courts correctly found that the first *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent. Under similar facts, the court in *Cronkhite v. Unity Physician Group*, *supra*, also concluded that the physician group did not set the rules and regulations of the plaintiff's work. To the contrary, "[t]hrough Dr. Cronkhite's status as a shareholder, he helped establish the rules and regulations of Unity's operations." *Id.* at *19. Similarly, as demonstrated by her own admissions, Petitioner has had the ability to help establish the rules and regulations governing the operations of Respondent law firm. Like Petitioner, Dr. Cronkhite failed to produce any affirmative evidence rebutting Unity's contention that it did not set the rules and regulations governing his work. In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the courts below

rightly determined that the first *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent.

C. On The Second *Clackamas* Factor, The Courts Below Properly Concluded That Petitioner Retains A Significant Degree Of Independence

The second *Clackamas* factor requires an analysis of "whether and, if so, to what extent the organization supervises the individual's work." *Clackamas*, 538 U.S. at 450. The courts below gave thorough consideration to this factor and, because the undisputed evidence demonstrates that Petitioner retains a significant degree of independence in her work, correctly found that it weighed in favor of a finding that Petitioner is an "employer."

The undisputed facts of this case, as set forth above, confirm that Petitioner handles her cases as she deems appropriate. Based on her own professional judgment, consistent with the interests and input of clients, Petitioner formulates the trial strategy on her cases. This is especially true for the work she has done for her own clients, wherein Petitioner consults with and reports to no one. Moreover, as a class A shareholder/director, Petitioner supervises other attorneys, including associates and other shareholders, as well as Respondent's support staff, on a regular basis. Accordingly, the record clearly supports the lower courts' findings that Petitioner retains a significant degree of independence in her work and that the second *Clackamas* factor therefore weighs in favor of a determination that Petitioner is not an "employee" of Respondent.

D. The Courts Below Properly Determined That The Third *Clackamas* Factor Weighs In Favor Of A Finding That Petitioner Is An Employer

The third *Clackamas* factor asks "whether the individual reports to someone higher in the organization." *Clackamas*, 538 U.S. at 450. Here, Petitioner maintains that she reported to Respondent's executive committee by virtue of the fact that, pursuant to the powers delegated to it under the by-laws, the executive committee performs certain organizational duties. Evaluation of the undisputed facts of record, as summarized above, confirms that Petitioner's various arguments in this regard are without merit.

Moreover, applicable case law supports Respondent's position and the lower courts' reasoning. In *Cronkhite, supra*, the district court found that the third *Clackamas* factor supported the conclusion that Dr. Cronkhite was not an employee of Unity. In that case, the plaintiff argued that he reported to Dr. Slaughter, the medical director of the emergency department, because as medical director, Dr. Slaughter performed certain organizational and liaison-type duties and conducted peer reviews of Dr. Cronkhite and other shareholder physicians who worked within the department. However, the court found that "these actions do not warrant a conclusion that Dr. Slaughter was Dr. Cronkhite's 'boss' or that he was positioned more highly within the organization than Dr. Cronkhite." *Cronkhite*, 2007 U.S. Dist. LEXIS 24884, at *26.

Relying on the fact that Dr. Slaughter conducted peer reviews of several Unity board members who worked in the department, the court reasoned that "it does not follow (and no evidence has been adduced to suggest) that Unity's board members all reported to Dr. Slaughter." *Id.* Similarly, in the present case, it does not follow, and no evidence has been adduced to suggest, that all of Respondent's shareholder/directors "report to" the executive committee.

To the contrary, review of Respondent's by-laws as well as the conduct of the parties reveals that it is the executive committee who reports to the shareholder/directors of the firm, including Petitioner. All of the authority held by the committee has been specifically delegated to it by the board of directors, and what the board can give, the board can take away. In other words, the executive committee, on which Petitioner could serve if elected by her peers or appointed, serves at the pleasure of the board. In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the courts below properly determined that the third *Clackamas* factor weighs in favor of a determination that Petitioner is not an "employee" of Respondent.

E. On The Fourth *Clackamas* Factor, The Courts Below Properly Found That Petitioner Has A Meaningful Opportunity To Exert Substantial Influence Over Decisions At Respondent

The fourth factor posed by this Court in *Clackamas* to determine whether a shareholder in a professional

corporation is an "employee" or an "employer" for purposes of the anti-discrimination laws is "whether and, if so, to what extent the individual is able to influence the organization." *Clackamas*, 538 U.S. at 450. The courts below correctly determined that as a class A shareholder/director and a voting member of the board of directors, Petitioner has a meaningful opportunity to exert substantial influence over decisions at Respondent. Relying on nothing more than suspicion and conjecture, Petitioner argues that corporate participation at Respondent is illusory and her status as a board member is meaningless.

However, the undisputed facts of record plainly show that Petitioner has had the ability, by virtue of her status as a voting member of the firm's board of directors for nearly a decade, to exert significant influence over the firm's management. Even in light of Petitioner's claims that such participation was "meaningless" and "illusory," pertinent case law confirms that the district court correctly found that the fourth *Clackamas* factor weighs in favor of a determination that Petitioner is an "employer" and not an "employee" of Respondent. As the Eighth Circuit explained in *Devine v. Stone, Leyton & Gershman*, 100 F.3d 78 (8th Cir. 1996) (affirming summary judgment in favor of defendant law firm because law firm was not an "employer" under Title VII), "a factor important to consider in evaluating the degree of management and control is the ability to participate in setting firm policy. Participation rights need not be equal, but the test is whether the shareholder-directors have a meaningful voice in decision-making." *Id.* at 81 (emphasis added).

The Seventh Circuit's opinion in *Schmidt v. Ottawa Med. Ctr., P.C.*, 322 F.3d 461 (7th Cir. 2003) (affirming summary judgment in favor defendant medical center because Schmidt could not establish that he was an "employee" under the ADEA) also highlights the significance of an individual's right to have a say in the decisions of the business. As in *Clackamas*, the issue in *Schmidt* was whether the plaintiff, a physician and shareholder-director in a professional corporation that operated the medical center where he worked, should be treated as an employer for purposes of the ADEA. Schmidt sought to challenge the medical center's shareholder compensation plan pursuant to the ADEA, and whether he was properly classified as an "employer" or "employee" determined whether he was entitled to bring suit. What persuaded the Seventh Circuit that Schmidt should be classified as an employer regardless of which methodology was used was his right, as both a shareholder and director, to participate in the governance of the corporation:

> As a shareholder, he possesses an equal vote in all matters put to shareholder vote, including the hiring of non-shareholder physicians and shareholder compensation. Presumably as a director, he has in the past and now also enjoys a voice in all matters put before the board. Throughout his relationship with OMC and continuing to the present day, Dr. Schmidt has thus had ample opportunity to share in the management and control of OMC. *** . . . the mere fact that lately his preferences on shareholder compensation proposals have not secured the majority opinion of his fellow shareholders does not alter the fact that with each vote he has exercised this right to control.

> Even though Dr. Schmidt rejected the current plan because he would be adversely affected by its passage, he nevertheless had the opportunity to participate in revising and voting on it.

Id. at 467.

The Seventh Circuit's decision in *Solon v. Kaplan, Begy & Von Ohlen, supra*, further illustrates the significance of having the right to participate in the governance of a law firm. In *Solon*, the power attendant to Solon's position as a general partner figured prominently in the court of appeals' decision that he constituted an "employer" under *Clackamas*. Similar to Respondent's by-laws in the present case, which require a three-fourths vote of all shareholder/directors, Solon's partnership agreement with his firm allowed for his involuntary termination only by a two-thirds vote of the general partners. Like Petitioner, Solon also exercised substantial control over whether to require additional capital contributions, make financial commitments, amend the partnership agreement, and dissolve the firm. Like Petitioner, Solon had the ability to vote on the admission of new partners. Also like Petitioner, in addition to his voting rights, Solon held an equity interest in the firm, shared in its profits, attended the partnership meetings, and had access to private financial information. And like Petitioner, each of these benefits distinguished him from the firm's special partners (who had no equity interest or voting rights) and associates, to whom Petitioner in this case wishes to compare herself. *Id.* at 633.

Solon's likeness to Petitioner in this case does not end there. Solon also argued that the powers

conferred on him by the partnership agreement were "illusory." The Seventh Circuit found no factual support for that contention, however, as the record also failed to support Solon's claim that, notwithstanding his status, he had no actual authority over the firm's affairs because in practice he was supervised closely by the other partners:

> Solon had substantial control over the firm . . . control that he had the right to exert by virtue of the partnership agreement. Plaintiff's assertion that he consulted with his fellow partners before making major decisions may demonstrate that he was passive, but it does not show that he was powerless. Nor does his contention that he was outvoted undermine the conclusion that he was an employer.

Solon, 398 F.3d at 634.

Other courts that have considered the issue are in agreement with this approach. For instance, the plaintiff in *Serapion v. Martinez,* 119 F.3d 982 (1st Cir. 1997) (affirming summary judgment in favor of defendant law firm because plaintiff, an equity partner in the firm, was not an "employee" under Title VII), like Petitioner, attempted to focus the Court's attention "on the ways in which she possessed less power than the four name partners." However, as the First Circuit astutely reasoned, Serapion's:

> constellation of complaints assumes that all partners except those equivalent in stature and authority to the most powerful partners of a law firm are employees for Title VII purposes. The assumption lacks any solid legal underpinning.

> A person with the requisite attributes of proprietary status is properly considered a proprietor, not an employee, regardless of the fact that others in the firm may wield more power. *** . . . focusing on the fact that her views sometimes did not prevail confuses participation with control. Insofar as the management prong of the test is concerned, the hallmarks of proprietary status are the right to participate in decisionmaking and the right to have a meaningful say in governance. Within the structure of any organization, certain individuals tend to dominate others, and the dominators' viewpoints will more often be adopted. This phenomenon often occurs among equals (Adams reportedly wrote to Jefferson on November 12, 1813, describing Dickinson as "primus inter pares, the bellwether, the leader of the aristocratical flock") and, in all events, the exercise of hegemony by one partner does not automatically dislodge others in the hierarchy from proprietary status. Elsewise, all the partners in a law firm or an accounting practice, save only the managing partner(s), would be treated as employees for Title VII purposes regardless of the extent of their ownership or the correlation between their remuneration and the entity's profits. The law is to the contrary: it is not a necessary corollary of proprietary status that the views of the partner in question will always – or even usually – prevail.

Serapion, 119 F.3d at 992. As the First Circuit further stated, "voting status in a law firm's highest decisionmaking body is no small thing. The fact that

the membership consisted of roughly half the lawyers in the firm dilutes, but does not dispel, the significance of such membership." *Id.* at 991.

Likewise, in *Cronkhite*, the district court found that the fourth *Clackamas* factor supported the conclusion that Dr. Cronkhite was not an employee of Unity. In that case, Dr. Cronkhite argued that his ability to influence Unity was limited, at best, because Unity's management structure was "centralized" due to the amount of control and influence Dr. Bishop, Unity's president and CEO, had over the company. The court found that the fact that Dr. Bishop may have exercised significant influence over the organization "does not negate the fact that Dr. Cronkhite influenced Unity as well." *Cronkhite*, 2007 U.S. Dist. LEXIS 24884, at *29. The court went on to explain that:

> This *Clackamas* factor does not require that all of those with influence had equal potential to control the organization; rather, we are to consider "whether, and if so, to what extent" an individual wielded influence. Clearly, Dr. Cronkhite exercised great control over the organization as a member of its Board from 1982 through 1996. *** Moreover, the fact that Dr. Cronkhite was not ultimately successful in some attempts to exert influence over Unity – specifically, his unsuccessful bid for a Board position in 2003 – does not demonstrate that he lacked influence.

Id.

In short, *Solon*, *Schmidt*, *Serapion* and *Cronkhite* confirm that the source of an individual's authority is

critical in determining whether he is appropriately classified as an employer or employee. In each of these cases, the plaintiff occupied a position (partner or shareholder/director) which by right gave him a vote in the affairs of the organization. That right did not necessarily enable the plaintiff to impose his own will on the organization: in *Solon*, the plaintiff had been removed from the partnership, and in *Schmidt*, an unfavorable compensation plan had been adopted over the plaintiff's objection. But in each case the plaintiff's status entitled him to a say in the fundamental decisions of the business that other workers, *e.g.*, associates, special partners, and non-shareholders, did not enjoy.

The same is true in the present case. Throughout her relationship with Respondent, Petitioner has had ample opportunity to share, and has shared, in the management and control of her law firm. The record is replete with examples of these opportunities. She has had the right and the ability to impose her will on Respondent through management service on various committees and through shareholder votes, in which she has not hesitated to take positions adverse to the position of the executive committee and her other fellow class A shareholder/directors. In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the lower courts correctly determined that the fourth *Clackamas* factor weighs in favor of a determination that Petitioner is not an "employee" of Respondent.

F. On The Fifth *Clackamas* Factor, The Courts Below Properly Determined That The Totality Of All Documents And The Conduct Of The Parties Demonstrate An Intent That Class A Shareholder/Directors Are Owners, Not Employees

The fifth factor articulated by this Court in *Clackamas* to determine whether a shareholder in a professional corporation is an "employee" or an "employer" for purposes of the anti-discrimination laws is "whether the parties intended that the individual be an employee, as expressed in a written agreement." *Clackamas*, 538 U.S. at 450. In *Clackamas*, this Court directed that a person's title and labels on documents are not determinative of whether the person is an employee under anti-discrimination laws and that there is no "shorthand formula or magic phrase" that is determinative of that issue. *Clackamas*, 538 U.S. at 449-50.

In this case, Respondent's by-laws clearly reflect the intent that shareholder/directors are owners of the professional corporation and as such are employers, not employees, of the firm. The by-laws govern equity interests in Respondent, the rights and duties to participate in management, exposure to liability, participation in profits and losses, capital investment in the firm, voting rights, calculations of distributions, and the security inherent in the fact that a shareholder/director can only be expelled through a three-fourths vote of his or her fellow class A shareholder/directors. Also, pursuant to section 3.08(g) of the by-laws, Petitioner, like all other class A shareholder/directors, receives a package of benefits

that associate attorneys and other employees do not receive. Since becoming a class A shareholder/director, Petitioner has availed herself of these rights and benefits. Clearly, the totality of such documents, as well as Petitioner's exercise of her rights and obligations pursuant to them, attests to the intent of both her and Respondent that class A shareholder/directors are owners of the firm and not merely employed by it. Thus, the lower courts rightly determined that the fifth *Clackamas* factor weighs in favor of a determination that Petitioner is not an "employee" of Respondent.

G. On The Sixth *Clackamas* Factor, The Courts Below Properly Determined That Petitioner Shares In The Profits, Losses, And Liabilities Of Respondent

The sixth *Clackamas* factor asks "(1) whether the individual shares in the profits, losses, and liabilities of the organization." *Clackamas*, 538 U.S. at 450. Here, Petitioner maintains that she did not share in Respondent's profits in any meaningful way. Evaluation of the undisputed facts of record, as summarized above, confirms that Petitioner's unsupported contentions in this regard are, at best, disingenuous.

As with each of the preceding *Clackamas* factors, applicable case law interpreting the sixth criterion supports the conclusion that Petitioner is an employer rather than an employee. Under comparable facts, in *Cronkhite*, *supra*, the district court found that the sixth *Clackamas* factor supported the conclusion that Dr. Cronkhite was not an employee of Unity. In that

case, although it was undisputed that Dr. Cronkhite shared in Unity's profits through his receipt of discretionary bonuses as a Unity shareholder, Dr. Cronkhite attempted to discount that fact by arguing that Unity's board of directors is solely responsible for the distribution of bonuses. The court stated that it "fail[ed] to see the relevance of this argument, noting that the Board's discretion does not change the fact that Dr. Cronkhite did in fact share in the company's profits nearly every year . . .." *Cronkhite*, 2007 U.S. Dist. LEXIS 24884, at *32 n.10; *see also Solon*, 398 F.3d at 631, 633 (relying in part on the fact that Solon shared in the law firm's profits in determining that he was not the firm's employee); *Schmidt v. Ottawa Med. Ctr., P.C.*, 322 F.3d 461, 462-63 (7th Cir. 2003) (affirming summary judgment in favor of defendant medical center because Schmidt could not establish that he was an "employee" under the ADEA, reasoning that "each shareholder-physician is also eligible to share in OMC's profits via shareholder compensation"). Likewise, the fact that the executive committee is responsible for annually setting each shareholder's percentage interest in the firm, by explicit delegation from the board through the by-laws, does not change the undisputed fact that Petitioner's annual compensation did, in fact, fluctuate with the rise and fall of Respondent's profits every year.

In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the lower courts correctly determined that the sixth *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent.

CONCLUSION

The petition in this matter does not meet any of the criteria set forth in the Rules of this Court for granting a writ of certiorari. Petitioner has not presented any compelling reasons for this Court to deviate from its Rules and grant a writ of certiorari. In addition, the district court and court of appeals correctly concluded, as a matter of law based upon undisputed material facts, that Petitioner is an employer within the meaning of the anti-discrimination laws who cannot assert claims under those statutes. Accordingly, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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No. 10-562

In The Supreme Court of the United States

ALYSON J. KIRLEIS,

Petitioner,

v.

DICKIE, McCAMEY & CHILCOTE, P.C.,
a Pennsylvania Professional Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION BRIEF

I. PETITIONER HAS STATED COMPELLING REASONS FOR CERTIORARI IN ACCORDANCE WITH SUPREME COURT RULE 10.

Respondent's assertion that Petitioner has not stated compelling reasons for her petition to be granted in accordance with Supreme Court Rule 10, *Brief in Opposition* ("*Opp.*") at 10-13, is patently incorrect. As Petitioner has demonstrated, and Respondent does not dispute, the Third Circuit failed to meet the well-established standard for considering motions for summary judgment stated by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *Petition for Writ of Certiorari* ("*Pet.*") at 12-15. Petitioner also demonstrated, again without any refutation by Respondent, that the Third Circuit actually defied this Court by sanctioning the district court's application of the economic realities test which was expressly rejected by this Court in *Clackamas Gastroenterology Associates, PC v. Wells*, 538 U.S. 440 (2003). *Pet.* at 15-19. Clearly, such conduct by the Third Circuit falls squarely within the parameters of Supreme Court Rule 10(a) as it reflects a decision by the Third Circuit which "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

Petitioner has also demonstrated that this case merits review by the Court under Supreme Court

Rule 10(c) because the Third Circuit "has decided an important federal question in a way which conflicts with relevant decisions of this Court," namely *Clackamas*. *Pet.* at 19-25. There can be no doubt that the issue of whether the protection afforded by anti-discrimination laws is available to female attorneys in law firms who have been relegated to secondary status despite corporate formalities which purport to give them ownership rights is an important federal question. In the instant case, the Third Circuit sanctioned the district court's refusal to look behind the corporate formalities of Respondent's By-Laws to the underlying realities that Petitioner had no effective opportunity to control or manage Respondent or share in its profits thereby denying Petitioner the ability to seek redress under Title VII and the Equal Pay Act for Respondent's discriminatory conduct. The Third Circuit chose to ignore voluminous facts developed during discovery which established Petitioner's lack of effective ownership rights in Respondent.

Respondent makes no attempt to rebut the substantive points of Petitioner's argument in which she demonstrates how the Third Circuit's decision fails to comply with this Court's mandate in *Clackamas* and the untenable position in which professional women and other minorities will find themselves if the Third Circuit's decision is permitted to stand. *Pet.* at 19-25. Instead, Respondent tries to trivialize the important employment discrimination issue by comparing the media attention that this case has received, which demonstrates that interest in this important issue

and the Third Circuit's decision extends beyond the Petitioner, to the media attention focused on the domestic problems of Britney Spears. *Opp.* at 12. Respondent has no answer to the argument articulated by Petitioner that under the Third Circuit's decision, professional women and other minorities can be denied the substantial legal rights afforded by anti-discrimination laws merely by virtue of being made nominal shareholders by the professional corporations which employ them. Notwithstanding Respondent's assertion to the contrary, Petitioner has demonstrated the importance of this issue which satisfies the requirements of Supreme Court Rule 10(c).

II. THE THIRD CIRCUIT'S DECISION EFFECTIVELY CREATES A SPECIAL STATUS FOR LAW FIRMS AND OTHER PROFESSIONAL CORPORATIONS IN THEIR EMPLOYMENT OF FEMALE PROFESSIONALS WHICH IS NOT PERMITTED BY *CLACKAMAS*.

Petitioner has demonstrated that the Third Circuit's failure to consider her substantial contradictory evidence effectively creates a separate status for law firms and other professional corporations which is not permitted by this Court's decision in *Clackamas*. Respondent's contention that the Third Circuit properly applied the *Clackamas* test is without merit. In attempting to justify the Third Circuit's decision, Respondent does nothing more than apply the same faulty analysis utilized by the Third Circuit. *Opp.* at

13-35. Like the Third Circuit, Respondent relies exclusively on facts that favor its position while totally ignoring the substantial contradictory factual evidence marshaled by Petitioner which supports her position that notwithstanding her nominal title of shareholder, the underlying reality in this case shows that she had no real control over the management and operation of Respondent's business and that she did not participate in the profits realized by the law firm. Petitioner's contradictory evidence created genuine issues of material fact with regard to each of the six factors under *Clackamas* thereby making the issue of her employment status completely inappropriate for summary judgment.

For example, Respondent erroneously asserts that the issue of whether Respondent's Executive Committee can terminate the employment of a shareholder is governed by Section 2.09 of Respondent's By-Laws which provides that a shareholder's relationship with Respondent can only be terminated by an affirmative vote of three-fourths of the other Class A shareholders and only for cause. *Opp.* at 16. Petitioner submitted contradictory evidence which establishes that, in fact, decisions concerning termination of shareholders are made by the Executive Committee by virtue of the power that it wields in connection with compensation

and work assignment matters. *App. 1122a, 2355a-2356a, 2521a.*[1]

Petitioner's evidence demonstrates that when the members of the Executive Committee desire to terminate the employment of a shareholder attorney, they reduce the amount of work assigned to the attorney. *App. 1123a, 1302a, 2355a-2356a, 2551a.* As a result of the reduction in work, the billed hours and profitability of the attorney go down, thereby giving the Executive Committee reason to lower the compensation paid to the attorney. *App. 1123a, 1302a, 2356a, 2551a.* With repeated reductions in compensation or the threat of reduction in compensation, the attorney becomes frustrated and leaves the firm, giving the members of Respondent's Executive Committee what they wanted, i.e., the termination of the attorney's employment with Respondent. *App. 1123a, 1302a, 2356a, 2552a.* Hunter A. McGeary, Jr. and David M. Neuhart are former Class A shareholders of Respondent who submitted affidavits in this case on Petitioner's behalf. Both McGeary and Neuhart testified in their affidavits that they were targeted by Respondent's Executive Committee in this manner. *App. 1123a-1124a, 1180a, 2351a-2352a, 2356a, 2362a, 2364a-2365a.* McGeary left Respondent as a result of the Executive Committee's threat to reduce his salary. *App. 1123a-1124a, 2362a, 2364a-2365a.* Neuhart

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[1] All citations to "*App.*" in this Reply Brief are references to the Appendix filed in the United States Court of Appeals for the Third Circuit.

left Respondent as a result of actual reductions in his salary made by the Executive Committee. *App. 1124a, 1180a, 2351a-2352a, 2356a.* The Third Circuit improperly ignored this evidence which demonstrates the realities of how Respondent actually terminates a shareholder's employment despite the provisions of Respondent's By-Laws. Instead, the Third Circuit focused only on the formalities of Respondent's By-Laws in concluding that Petitioner's employment could only be terminated by a vote of three-fourths of all shareholders for cause.

Similarly, Respondent's contention that undisputed evidence establishes that Petitioner has a meaningful opportunity to influence the firm is contradicted by Petitioner's overwhelming evidence which demonstrates that she has no meaningful input into or influence over the control, management and operation of Respondent. In fact, Petitioner's evidence, which was ignored by the Third Circuit, shows that the Executive Committee does not comply with the By-Laws on which the Third Circuit relied in concluding that Petitioner is not an employee of the firm. The Executive Committee has created the illusion of corporate participation by Petitioner which is nothing more than a sham to maintain control of Respondent in the hands of the Executive Committee.

Petitioner's evidence demonstrates that shareholders make a $7,500.00 capital contribution which is a nominal amount and is part of the sham arrangement at Respondent. The capital contribution is intended to give the illusion of ownership to

shareholders of Respondent. It has no relationship whatsoever to the approximately $51 million dollars per year that Respondent is currently billing nor to the income received by the various shareholders of Respondent. *App. 1222a, 1788a-1791a, 1803a-1809a, 2083a, 2347a-2348a, 2362a, 2385a-2397a.* Although Respondent's billings increased from $33 million dollars annually to $51 million dollars annually over the past 5 years, the nominal amount of the capital contribution, $7,500.00, has remained unchanged for new shareholders. *Id.* Similarly, the amount of the capital contribution has remained unchanged even though the income of the various shareholders has increased during the relevant period. *App. 1222a, 1788a-1789a.*

The illusion of corporate participation is perpetuated by Respondent's Executive Committee in the way it makes decisions in secret and then presents them to the Board of Directors for an after-the-fact oral rubber stamp ratification. *App. 1159a-1210a, 1243a-1244a, 1266a, 1272a, 1277a-1279a, 1283a, 1286a-1287a, 1291a-1292a, 1296a, 1312a-1313a, 1316a-1329a, 1362a, 1368a-1369a, 1400a-1402a, 1404a-1406a, 1409a-1410a, 1412a-1413a, 1416a-1417a, 1453a-1470a, 1475a-1494a, 1497a-1499a, 1507a-1508a, 1513a-1515a, 1559a-1561a, 1591a-1595a, 1604a-1605a, 1618a-1621a, 1624a-1626a, 1641a-1642a, 1644a-1648a, 1658a, 1661a-1666a, 1668a, 1670a-1673a, 1675a, 1701a, 1757a-1758a, 1768a-1777a, 1799a-1800a, 1803a-1809a, 1817a, 1821a-1867a, 1880a, 2000a-2026a, 2049a-2082a, 2084a-2344a, 2346a-2347a,*

2354a-2359a, 2362a, 2364a-2365a, 2372a-2373a, 2375a-2376a, 2386a-2392a, 2424a-2446a, 2549a, 2552a-2557a.

Petitioner's evidence showed that votes taken at meetings of Respondent's Board of Directors are not meaningful in that they are frequently oral yea or nay votes which are prefaced by a request for a showing or sign of support for what the Executive Committee has already decided or done. *App. 1159a, 1278a-1279a, 2358a, 2365a.* As stated by both Hunter McGeary and David Neuhart in their affidavits, they viewed meetings of the Board of Directors as meaningless for this reason and stopped attending. *App. 1176a, 2049a-2050a, 2358a, 2365a.* Apparently, many other shareholders shared that view because there was no quorum of directors at 88 of the 97 Board of Directors meetings held between February of 2001 and June of 2009. *App. 1176a-1207a, 2049a-2081a, 2084a-2336a, 2358a, 2365a.* The Executive Committee presented its decisions to the Board of Directors for ratification without a quorum which is a violation of Section 2.06(a) of Respondent's By-Laws. Petitioner's evidence regarding the lack of a quorum of shareholder/directors in office for the proper transaction of business pursuant to Section 2.06(a) of the By-Laws was undisputed by Respondent yet disregarded by the Third Circuit. *App. 1176a-1207a, 2050a-2081a, 2084a-2336a, 2744a-2751a.*

Petitioner's evidence demonstrates that she has absolutely no voice in decisions relating to compensation, which is critical since this case involves claims of pay disparity. Respondent admits that all

decisions relating to shareholder salary and bonuses are made in secret by the Executive Committee. *App. 1165a-1169a, 1604a-1605a, 1618a-1626a, 1644a-1648a, 1757a-1758a, 1799a-1800a, 1803a-1809a, 1811a-1812a, 1847a-1861a, 2082a, 2354a-2355a, 2364a, 2372a-2376a, 2386a-2391a, 2424a-2446a, 2549a.* Information relating to salaries paid and bonuses awarded to individual shareholders is withheld from Petitioner and other shareholders so that they will not know what other shareholders earn. *App. 1165a-1167a, 1604a-1605a, 1618a-1626a, 1803a-1809a, 1847a-1861a, 2354a-2355a, 2372a-2376a, 2424a-2446a.* Petitioner is not told and does not know what other shareholders of Respondent are earning and does not have access to the books and records of Respondent which contain that information. *App. 1166a-1167a, 1604a-1605a, 1618a, 1625a-1626a, 1847a-1861a, 2354a-2355a, 2373a-2375a, 2424a-2446a.* Prior to this litigation, Petitioner did not know the method by which her compensation and alleged ownership or equity percentage is set by the Executive Committee. *App. 1224a, 2081a-2082a, 2378a.*

Respondent further argues that it was undisputed that Petitioner shared in the profits, losses and liabilities of the firm. *Opp.* at 6-8, 34-35. This assertion is incorrect. Petitioner proffered substantial record evidence to support her position that her compensation is a salary and not a share of profits as asserted by Respondent. Petitioner adduced evidence which shows that her compensation and the compensation paid to other shareholders of Respondent is not

based on an ownership interest in Respondent, which is supposedly in equal shares. *App. 1223, 1628a, 2348a.* Rather, Petitioner's compensation is a salary that is determined in secret by Respondent's Executive Committee using the same criteria it uses to determine the compensation paid to associate attorneys who Respondent admits are employees of the firm. *App. 1223a-1226a, 1516a-1525a, 1618a, 1625a-1627a, 1629a-1632a, 1636a-1639a, 1848a-1861a, 2081a-2083a, 2348a, 2354a-2355a, 2377a-2382a, 2384a-2385a, 2393a, 2403a-2412a, 2455a, 2459a.*

Petitioner's evidence also shows that after setting the salaries, the Executive Committee calculates an alleged percentage of ownership of the firm for each shareholder – which is unrelated to the actual number of shareholders – by working backward from or "backing out" each shareholder's projected compensation from the total projected amount of money available for distribution. *App. 1224a-1225a, 1630a-1631a, 1633a, 2378a, 2384a-2385a, 2393a, 2403a-2412a.* In other words, after projecting the total size of the pie, the Executive Committee slices the pie in dollar terms and then transforms that predetermined dollar amount into a percentage of ownership in the firm. *App. 1225a, 1633a, 2378a.* This percentage supposedly represents the shareholder's ownership or equity interest in the firm. *App. 1224a, 2378a, 2384a-2385a, 2393a, 2403a-2412a.* However, this is not so because the percentage varies every year and is not equal as to each shareholder since it is not arrived at based on the number of shareholders in the firm. *App. 1225a,*

1627a, 1629a, 2379a-2382a, 2403a-2412a. This percentage is applied to Respondent's actual revenues each year to give Petitioner an increased or decreased last payment of the year which Respondent calls a salary bonus on its shareholder history form for Petitioner if it is an increased payment. *App. 1225a, 1516a-1525a, 2083a, 2378a.* Petitioner's total salary for the year is referred to by Respondent on the shareholder history form that it prepares for each shareholder, including Petitioner, as actual salary including bonus, if any. *App. 1225a, 1525a.* Respondent also refers to total salaries paid to shareholders as salary or payroll in notes relating to attorney compensation. *App. 1225a-1226a, 1525a, 1629a, 2455a, 2459a.*

The foregoing evidence of record illustrates that the Third Circuit's affirmation of summary judgment in favor of Respondent was clearly improper. The Third Circuit ignored the overwhelming contradictory evidence proffered by Petitioner, which demonstrates an extremely strong case against the entry of summary judgment, and relied solely on the content of Respondent's By-Laws. In so doing, the Third Circuit has in effect created a separate regime for law firms and other professional corporations. Under the Third Circuit's decision, the by-laws and other formative documents of a law firm are to be taken completely at face value and are not to be examined in light of evidence of the underlying realities of how the law firm is actually operated. In the instant case, the underlying realities show that Petitioner's employment

with Respondent can be terminated without regard to the By-Laws by Respondent's Executive Committee, that Petitioner has no real opportunity to control or manage the operations of Respondent and that Petitioner does not participate in the profits of the firm.

In relying on Respondent's By-Laws to the exclusion of overwhelming contradictory evidence that Respondent does not actually operate in accordance with its By-Laws, the Third Circuit clearly failed to adhere to the holding of this Court in *Clackamas* which requires that evidence of all of the incidents of the relationship between Petitioner and Respondent be considered in determining whether Petitioner, despite her nominal title of shareholder, is entitled to invoke the protections against discrimination in the workplace available under antidiscrimination laws. The Third Circuit, by considering only Respondent's By-Laws and ignoring the evidence of what actually occurs in the operation of Respondent's law firm, has, in effect, deprived the *Clackamas* decision of any meaning.

The Third Circuit's decision merits review by this Court so that professional women lawyers and other minorities who bear the nominal title of shareholder in a professional corporation are able to seek redress for injuries sustained as a result of discriminatory conduct by their employers.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, Petitioner requests that this Court grant her petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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